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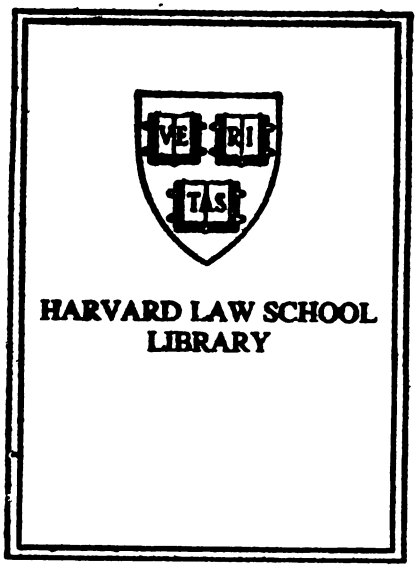

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 24, 1890, TO FEBRUARY 27, 1891.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 84.

CHICAGO:
CALLAGHAN & CO.,
1891.

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Rec. Aug. 13, 1891

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STATE JUDICIAL DIRECTORY

For 1891.

SUPREME COURT.

JOHN W. CHAMPLIN (CHIEF JUSTICE), . . GRAND RAPIDS.
[TERM EXPIRES DECEMBER 31, 1891.]

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		TERM EXPIRES.
ALLEN B. MORSE, . . .	IONIA, ...	Dec. 31, 1893.
JOHN W. McGRATH, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

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MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
ADOLPHUS A. ELLIS, . .	ATTORNEY GENERAL, . .	IONIA.

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3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	FRANK A. HOOKER,	CHARLOTTE.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
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26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	HOWELL.
31.	WILLIAM T. MITCHELL,	PORT HURON.
32.	NORMAN W. HAIRE,	ONTONAGON.
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RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder.

Terms of Court.

September 2 and November 4, 1891.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

Terms of Court.

Sept. 14 and Dec. 14, '91, March 10 and May 12, '92.

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COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	February 10.	June 23.	November 17.	
Alger	11	June 2.	Nov. 10.		
Allegan	20	February 9.	May 18.	October 5.	December 7.
Alpena	26	February 10.	May 5.	August 11.	November 3.
Antrim	13	March 10.	May 19.	July 28.	November 10.
Arenac	18	February 23.	Aug. 24.		
Baraga	12	January 5.	June 8.	October 5.	
Barry	5	February 9.	May 11.	August 17.	November 9.
Bay	18	March 3.	June 2.	September 1.	December 1.
Benzie	28	April 14.	Sept. 1.	December 1.	
Berrien	2	January 13.	March 17.	May 19.	October 20.
Branch	15	March 2.	June 1.	October 5.	December 7.
Calhoun	5	March 9.	June 1.	September 14.	December 7.
Cass	2	February 17.	April 28.	September 22.	December 1.
Charlevoix	13	February 17.	May 12.	July 21.	November 17.
Cheboygan	33	January 27.	March 24.	June 16.	September 22.
Chippewa	11	February 3.	May 12.	September 15.	
Clare	21	January 5.	March 30	June 22.	September 21.
Clinton	29	February 2.	April 27.	June 29.	November 9.
Crawford	23	January 13.	April 21.	October 6.	
Delta	25	January 6.	May 5.	September 29.	
Eaton	5	January 19	April 20.	July 20.	October 19.
Emmet	33	February 10.	May 5.	July 14.	October 27.
Genesee	7	February 23.	May 25.	August 17.	November 16.
Gladwin	18	January 19.	May 25.	October 12.	
Gogebic	32	January 29.	May 11.	August 3.	November 2.
G'd Traverse	13	January 6.	April 7.	June 23.	October 13.
Gratiot	29	March 9.	June 1.	September 14.	December 7.
Hillsdale	1	January 13.	March 17.	September 1.	November 10.
Houghton	12	February 9.	May 25.	August 17.	November 16.
Huron	24	January 5.	March 2.	June 1.	October 26.
Ingham	30	January 5.	March 9.	May 25.	October 19.
Ionia	8	February 2.	May 4.	September 21.	November 2.
Iosco	23	March 3.	June 2.	September 1.	December 1.
Iron	25	January 14.	May 13.	October 7.	
Isabella	21	February 23.	May 18.	September 7.	October 19.

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TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	February 2.	April 20.	September 14.	November 16.
Kalamazoo	9	February 16.	May 18.	October 19.	December 14.
Kalkaska	28	January 13.	April 21.	September 8.	
Kent	17	March 2.	May 4.	September 28.	December 7.
Keweenaw	12	January 12.	June 15.	October 12.	
Lake	19	February 16.	June 15.	October 12.	
Lapeer	6	January 12.	March 9.	July 13.	November 2.
Leelanaw	13	March 17.	June 9.	November 24.	
Lenawee	1	February 10.	April 28.	October 6.	December 8.
Livingston	30	January 12.	April 20.	June 15.	October 12.
Luce	11	May 5.	Nov. 3.		
Mackinac	33	February 24.	June 9.	October 13.	
Macomb	16	January 19.	April 20.	August 17.	October 19.
Manistee	19	January 19.	May 4.	August 10.	October 26.
Manitou	33	June 23.	Oct. 27.		
Marquette	25	February 9.	May 20.	September 8.	December 1.
Mason	19	February 2.	May 18.	August 24.	November 9.
Mecosta	27	January 6.	April 7.	July 2.	November 3.
Menominee	25	January 20.	April 21.	August 25.	November 10.
Midland	21	January 19.	April 13.	August 31.	September 28.
Missaukee	28	March 3.	July 21.	December 8.	
Monroe	22	February 3.	April 7.	September 8.	November 3.
Montcalm	8	March 2.	June 1.	October 5.	December 7.
Montmorency	26	May 19.	Sept. 15.		
Muskegon	14	February 9.	May 11.	September 14.	November 23.
Newaygo	27	March 3.	June 2.	October 6.	December 1.
Oakland	6	February 2.	May 4.	September 21.	December 7.
Oceana	14	January 12.	April 20.	August 17.	October 26.
Ogemaw	23	January 27.	May 12.	October 20.	
Ontonagon	32	January 19.	June 23.	October 19.	
Osceola	19	March 2.	June 1.	September 14.	December 7.
Oscoda	23	February 23.	May 25.	November 2.	
Otsego	26	January 20.	June 16.	October 6.	
Ottawa	20	January 12.	March 9.	August 3.	November 2.
Presque Isle	26	January 13.	June 9.	October 13.	
Roscommon	28	February 3.	May 26.	October 13.	
Saginaw	10	February 2.	April 13.	June 8.	Oct. 5. | Dec. 7.
Sanilac	24	January 19.	April 13	June 2.	September 28.
Schoolcraft	11	January 20.	April 28.	September 8.	
Shiawassee	7	February 2.	May 4.	September 14.	December 14.
St. Clair	31	February 16.	May 18.	September 21.	November 16.
St. Joseph	15	January 20.	March 24	July 14.	October 27.
Tuscola	24	February 2.	May 4.	September 7.	December 7.
Van Buren	9	January 12.	April 13.	September 14.	November 9.
Washtenaw	22	March 2.	May 4.	October 5.	December 7.
Wayne	3	January 6.	April 7.	June 16.	September 8.
Wexford	28	January 20.	April 28.	July 28.	November 3.

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[1] Rehearing granted at January term, 1891.

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[1] Rehearing granted at April term, 1891.

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GILBERT G. McDUFF v. THE DETROIT EVENING JOURNAL COMPANY.

Libel and slander—Pleading—Damages—Evidence—Practice in circuit courts—Conduct of counsel and court.[1]

1. The fact that an article is libelous *per se* does not render evidence of special damages, or of specific acts of others towards the plaintiff in consequence of its publication, admissible, unless alleged in the declaration.
2. Under an allegation of general damages in a libel suit, the issue is, what damages has the plaintiff sustained *generally* in the community where he is known, by the publication of the libelous article? and not what he has suffered in individual instances where those who have known him have treated him differently from what they did before. In the latter case, if he wishes to recover damages, he must allege them.
3. A son was made trustee of his father's estate, and changed his residence to accept the trust. He brought a libel suit for an alleged false publication charging him with having "got away with the property," and with leaving his parents in a starving condition, and on the trial one of his witnesses was asked if he did not send for plaintiff to come and take charge of the estate, and answered, under objection, that he did, the communication being made by letter; which testimony is held irrelevant, it being of no consequence *how* he came to take charge of the estate, but, if material, the letter was the only competent evidence of the fact.
4. An editorial in a newspaper published in another state, referring to the subject-matter of an article for the publication of

* Continued from Vol. 83.

[1] For full digest of points decided, see *Table of Cases Reported.*

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which a libel suit is brought, but which is not shown to have been based upon such publication, is inadmissible as evidence in said suit, and if admitted the error is not cured by striking it out of the case.

5. Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury; and whenever he expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice them, he commits an error of law for which the verdict and judgment must be promptly set aside.

6. It is never proper practice, when an objection to a question has been sustained, for counsel to state in the presence of the jury what he can or proposes to prove if allowed to do so.

So *held*, where a witness was asked on cross-examination if he had not taken a lewd woman into his house, and the answer was excluded, whereupon the counsel asking the question stated that if the objection was withdrawn he could prove the fact by the sister of the witness, and the court refused to instruct the jury that the remarks were improper, and that they should pay no attention to them, which statement and refusal are held to be reversible error.

Error to Wayne. (Brevoort, J.) Argued October 10, 1890. Decided December 24, 1890.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Wilkinson & Post (*Levi T. Griffin*, of counsel), for appellant.

James H. Pound, for plaintiff.

GRANT, J. This is an action of libel, in which the plaintiff recovered verdict and judgment, and defendant appeals.

The libelous article is as follows:

"Humane Agent Vhay is investigating the case of Andrew McDuff [meaning the plaintiff], 73 Beech street, who

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is charged with having got away with the property of his father and mother, who are now said to be starving in a Jones-street attic."

Other publications subsequent to this upon the same subject were introduced by plaintiff under objection, and he then introduced evidence tending to show the falsity of the libelous article. Testimony was introduced on the part of the defendant tending to prove the truth of the charge, and good faith in its publication. The issue in the case was as clear and simple as can well be imagined. If the charge was not true, then the article was libelous. The questions to be submitted to the jury were:

1. The truth of the libelous article.
2. If not true, the amount of damages suffered.
3. The good faith of the defendant in mitigation of damages.

1. The first point raised in defendant's brief is that the cause should not have been submitted to the jury at all. This point was not raised in the court below, and is not assigned as error, and therefore cannot be considered here.

2. The following questions were asked the plaintiff, and answered under objection:

"*Q.* Has there been any difference whatever in the treatment since the publication of these articles by any of your acquaintances from what there was before?"

"*Q.* Will you tell us in what the difference consisted?"

This testimony was objected to for two reasons:

1. Because it involved special damages not alleged in this declaration.
2. The questions were not confined to the libelous publication declared on, but involved damages resulting from other publications.

Both objections were well taken. The allegation of damages in the declaration is as follows:

"He, the said plaintiff, has been and is greatly injured

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in his good name, fame, credit, and reputation, both as an individual and as such trustee, and brought into public scandal and disgrace, is suspected to have been guilty of the misconduct charged upon and imputed to him as aforesaid, and has been greatly vexed, harassed, oppressed, and impoverished, and hath been and is otherwise much injured."

No special damages are alleged; only general damages, in the general and usual language of declarations in libel cases.

The article is libelous *per se* but that of itself does not render evidence of special damages, or of specific acts of others towards plaintiff in consequence of the publication, admissible, unless alleged in the declaration. Whenever a plaintiff alleges no special damages, he is presumed to rest content with those damages which are the natural result of the libelous publication upon his character and reputation and feelings, without proof of specific facts. He is presumed to have a good reputation and character. The damages he is entitled to recover are the result of the natural injury to these and to his feelings, coupled with the malice, or want of malice, with which the article was published. These the defendant is prepared to meet. He cannot be prepared to meet special instances of slight, avoidance, loss of hospitality on the part of friends and acquaintances, from whatever part of the world the plaintiff may choose to bring witnesses or to testify himself. If plaintiff desires to recover for damages for such special injuries, he must allege them. *Bassil v. Elmore*, 65 Barb. 627; *Terwilliger v. Wands*, 17 N. Y. 57; *Dicken v. Shepherd*, 22 Md. 399; Folk. Starkie, Sland. & L. § 378, and cases there cited.

The rules of pleading are founded upon reason and fairness. The issue in ordinary lawsuits is limited. The parties are more or less familiar with the transactions involved, and the defendant may fairly be presumed to

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have some knowledge of the testimony against him, and what witnesses he can produce to meet it. In a libel suit, under an allegation of general damages only, the issue is, what damages has the plaintiff suffered generally in the community where he is known, by the publication of the libelous article? and not what he has suffered in individual instances where those who have known him have treated him differently from what they did before. In the latter case, if he wishes to recover damages, he must allege them. No other rule would be fair and reasonable. *Davies v. Solomon*, 41 Law J. Q. B. 10. In that case the allegation was that the plaintiff had ceased to receive the hospitality of divers friends, naming them. It is laid down in Folkard's Starkie, Sland. & L. § 634, that—

"A plaintiff, under an allegation of general injury, may show a general diminution of business; but, if he seeks specific damages, he must give specific evidence."

An examination of some of the records in libel suits heretofore decided by this Court has convinced me that this has been understood by the profession to be the rule. In *Weiss v. Whittemore*, 28 Mich. 374, it was decided that, under the allegation of a general loss of trade, the names of the customers driven away or lost need not be mentioned. But the Court held:

"The general allegation of the loss of trade is sufficient, and the declaration may be supported by evidence of such general loss."

It was held in *Bourreseau v. Journal Co.*, 63 Mich. 437, that it was not competent for the defendant to prove distinct facts that had not been made part of the issue as framed, and that no one could be prepared in advance to anticipate every fact, true or false, which might be offered in evidence, and of which plaintiff had no notice. The evidence on the part of the plaintiff must be governed by the same rule as on the part of the defendant; and,

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if the defendant cannot introduce specific facts without pleading them in justification, for the same reason the plaintiff should not be permitted to prove them. Otherwise, there would be one rule of evidence for the plaintiff, and another for the defendant. Briefly stated, the rule is that the allegation of general damages will admit only general proof.

3. Plaintiff was one of the trustees of the estate of Andrew McDuff. He was not living in Detroit at the time he was made trustee. One McFedries, a son-in-law of Andrew McDuff, was asked the following question:

"You did send for Gilbert McDuff to come here and take charge of this estate?"

This was objected to as irrelevant and incompetent; the request, if any, having been made by letter. Plaintiff's counsel then offered some letters written by the witness to plaintiff, which the counsel himself said he did not think were admissible. After considerable discussion by counsel, the court asked the witness the following questions:

"*Q.* You did send for Gilbert McDuff to come here and take charge of this estate?

"*A.* I did, most emphatically.

"*Q.* Did you consult with his father and mother before you sent for him?

"*A.* Yes, sir.

"*Q.* How did you communicate with him?

"*A.* In writing the letter."

Thereupon counsel for defendant moved to strike out the answers and questions, to which motion the court replied:

"I am going to let them stand, if they are the only answers in the case."

The testimony was both irrelevant and incompetent. So far as the management of the estate by plaintiff was concerned, it was of no consequence how he came to

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take charge of the estate; but, if material, the letters were the only competent evidence of the fact.

4. Another witness for plaintiff was asked the following question:

"That part of the article published in the Detroit Evening Journal of February 1, 1888, stating 'who are said to be starving in a Jones-street attic,' referring to the mother and father of the plaintiff, is it true or untrue?"

This question was for the determination of the jury from the facts placed by the evidence before them. It called for the opinion of the witness from the facts within her knowledge. These facts it was competent to testify to. The conclusion was for the jury, and not for her. The answer called for her opinion, which was clearly improper.

5. A copy of the Omaha Herald was introduced, containing the following:

"Andrew McDuff, of Detroit, who had amassed a fortune, had not been seen for about ten years, till recently found by an agent of the Humane Society. He was confined in a cold and filthy room, without food or sufficient covering. Probably, the relatives who have been living off Mr. McDuff's money during these ten years thought that such treatment would kill the old man. Now that the unfortunate has been rescued, there only remains the pleasant duty of sending his unnatural son to the penitentiary, which fairly yearns to receive him."

This was objected to, and was finally stricken out by the court. In this connection a letter from one P. McDuff, a brother of the plaintiff, was introduced, under objection, which contained the following:

"Some person unknown to me sent me Omaha Herald for February 4, with a piece on the fourth page marked, which if you think proper to look it up, you will probably excuse my course."

Plaintiff showed no connection between the publication

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in the Journal and the article in the Omaha Herald, which appeared under the editorial column of that paper, and not as a piece of news obtained from another publication. That article and the letter were clearly inadmissible. The jury very likely presumed that the article in the Omaha Herald was based upon the article in the Journal, but there was no evidence of the fact. Error in admitting such testimony is not cured by striking it out. There may be cases where courts may well say that the jury could not be prejudiced by the admission of incompetent testimony when it is stricken out. In such case it would be error without prejudice, and judgment would not be reversed for that reason. But we cannot apply such ruling to the present case, where the inevitable result of the evidence would be so injurious to defendant.

6. A witness on behalf of the plaintiff was asked:

"Now, I would like to know whether any of your customers that you remember stated anything with reference to their being moved to tears by this article.

"A. A lady came into the store, and said that her mother read it, and shed tears over it, and felt badly about it, and gave as a reason that she had been a schoolmate of his."

This testimony was clearly too incompetent, on the ground of hearsay, to merit discussion.

7. The next assignment of error relates to the conduct of the circuit judge upon the trial. To an objection to the admission of testimony made by defendant's counsel, the court said:

"I do not want to compliment Mr. Pound, but I am well aware of the fact that Mr. Pound knows how to try a lawsuit."

Mr. Brearley, the manager of the defendant, at the close of his cross-examination was dismissed by plaintiff's counsel with the remark:

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"I think that is all, Mr. Brearley; you can go on and state that I have not cut my eye-teeth again, if you wish."

Defendant's counsel excepted to this remark, to which the court said:

"I do not think the papers make fair remarks. I noticed the paper called Mr. Pound 'General.'"

Plaintiff's mother, who was 75 years old, was asked if plaintiff had said anthing to her about her moving out of the house, and answered:

"I understood that he wanted me to go to the Old Ladies' Home.

"*The Court.* Answer the question.

"*Witness.* I am trying to.

"*Court.* You are not. I do not hesitate to say it to you, madam."

A colored man by the name of Johnson was a witness for the defendant. He had made a statement which was in direct conflict with the testimony on the part of plaintiff. Plaintiff's counsel thereupon asked the court to commit the witness for perjury, and stated to the court, in the presence of the jury:

"The witness deliberately lied when he said Gilbert McDuff locked his father up in that house."

Defendant's counsel excepted to this language, and the court thereupon said:

"I tell you, I have a decided opinion of this man's testimony, and I intend in my charge to the jury to call their attention to his testimony. The manner in which this man swore yesterday is something I shall never live long enough to forget. And put this in the record, if it ever gets out of the court-room, and keep it there: A man who will do as he did, and point out a man under the solemnity of oath, and swear that a certain man paid $1.10, I say, sir, I have my opinion about it, and a decided opinion of it."

Defendant's counsel objected to this statement, and

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stated that the court had no business to make such a remark from the bench; to which the court replied:

"I have. Take your exception. I have, and I will say more if you want it."

And in charging the jury the judge said of this witness:

"I think it my duty to charge you that in regard to his evidence I have a decided opinion."

With the propriety of such conduct and language we have nothing to do. Our only province is to determine whether they amount to a legal error; and however unpleasant the duty may be, in such cases, we must not shrink from performing it. Whatever language may be used by counsel in the heat of trial, it is the legal duty of the judge to preside and decide with impartiality, and to keep counsel within proper bounds. Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury. It is their duty to follow his instructions as to the law. Whenever he expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice them, he commits an error of law for which the verdict and judgment must be promptly set aside. Appellate courts cannot correct mistakes of fact. Trial courts, therefore, cannot be too circumspect and careful to see that questions of fact are submitted to the unbiased judgment of the jury, which, under our jurisprudence, are for their sole determination. To sanction such conduct and language as the above by the circuit judge would tend to render trials a farce, and result in a denial of justice. Language less open to criticism has been held error by this Court. *Wheeler v. Wallace,* 53 Mich. 355; *Cronkhite v. Dickerson,* 51 Id. 177; *People v. Hare,* 57 Id. 505.

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8. The witness Peter McDuff was asked by plaintiff's counsel, on cross-examination, if he had not taken a lewd woman into his house. This, upon objection, was excluded, whereupon plaintiff's counsel stated that, if counsel for defendant would withdraw his objection, he could prove it by this man's sister. The court refused to instruct the jury that the remarks were improper, and that they should pay no attention to them. It was error on the part of counsel to make the remarks. No verdict should be allowed to stand in the face of such statement to prejudice the jury, and to get the full effect of excluded evidence before them. It is never proper practice, when an objection to a question has been sustained, for counsel to state in the presence of the jury what he can or proposes to prove if allowed to do so. After it was made, the court could not well have done less than to instruct the jury to disregard it.

It is alleged that errors were committed in instructing the jury upon the measure of damages. What we have already said upon the question of special damages renders any discussion of these instructions unnecessary. Under the repeated decisions of this Court upon this subject, no difficulty can exist in properly instructing a jury. The rules governing this case are laid down with clearness and precision in *Scripps v. Reilly*, 38 Mich. 10.

Judgment must be reversed, with costs of both courts, and a new trial ordered.

CAHILL and LONG, JJ., concurred with GRANT, J.

CHAMPLIN, C. J., and MORSE, J., concurred in the result.

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IDA A. COOK v. THE STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

Accident insurance—Conditions—Waiver—Limitation of authority of agent—Evidence—Intoxication—Proofs of loss.

1. The acceptance of a policy of insurance which expressly negatives the right of the agent to waive or alter any of its conditions estops the assured from setting up or relying upon any action on the part of the agent in opposition to such prohibition.

   So *held*, where an agent issued an accident insurance policy upon the written application of the assured, in which he represented that his habits of life were correct and temperate, and which stated that it was understood and agreed that the policy to be issued would not cover any accidental injury which might happen while the assured was under the influence of intoxicating drinks, or in consequence of his having been under such influence. It was provided in the policy that none of its conditions could be waived by any of the agents of the company, among which conditions was the non-liability provision above stated. The assured was in the habit of getting intoxicated when he made his application, which fact was known to the agent. The assured was killed by falling upon a slippery sidewalk, and in a suit brought to recover the insurance the company defended on the ground of the false representations in the application, and because, as it claimed, the accident happened while the assured was under the influence of intoxicating drinks, which defense was met by the claim that, the agent having, with knowledge of the habits of the assured, issued the policy, thereby causing him to rely upon it as valid, the company was estopped from setting up that fact to defeat a recovery, it being chargeable with the knowledge of its agent, which operated as a waiver of the conditions referred to, and prevented it from making said defense; which contention is held untenable under the doctrine laid down in *Cleaver v. Insurance Co.*, 65 Mich. 527, which is affirmed.

2. A witness may state whether or not a person had the appearance of being intoxicated, such statement not being mere opinion, but the statement of a fact.

   So *held*, in a suit upon an accident insurance policy which did not cover injuries received while the assured was under

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the influence of liquor, and on the trial the defendant sought to bring the case within such exception, and to that end asked one of plaintiff's witnesses, who had testified to driving the assured home on the night of the accident, if he was impressed with the idea that it was necessary for some one to do so on account of his condition; and asked one of defendant's witnesses, who had testified to being in the company of the assured during the day on which the accident occurred, and to seeing him drink, etc., if in his judgment the assured was in as good condition to take care of himself in walking and in avoiding danger from falls on a sidewalk, partly covered with ice and snow, as though he were sober; and asked another witness whether the assured was drunk or sober at the time of the accident, he having testified to seeing him at about that time; all of which questions are held to have been proper under the rule stated.

3. Whether proofs of death comply with the requirements of an insurance policy is a question for the court, and if that issue is tendered by the defendant the proofs furnished may be put in evidence and read to the court, but they are matters in which the jury are in no way concerned.

4. In such a case, where there is no contention on the part of the company but that preliminary proofs were furnished in full compliance with the terms of the policy, it is error to permit the plaintiff to read such proofs in full to the jury, including an affidavit of an eye-witness of the accident causing death, the physician's statement, and the certificate of the coroner, which may have had their influence upon the jury, and have been taken by them as proof of the facts therein contained.

Error to Muskegon. (Dickerman, J.) Argued October 14, 1890. Decided December 24, 1890.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

F. W. Cook (*James T. Keena,* of counsel), for appellant.

DeLong & O'Hara, for plaintiff.

LONG, J. On May 7, 1888, the defendant, a Michigan corporation, issued to the husband of plaintiff a policy

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of insurance for $5,000 upon a premium being paid of $25. A written application was filled out by the defendant's agent at Muskegon, and was signed by Bigelow T. Cook, the husband of plaintiff, the plaintiff being named as the beneficiary in the policy. The application contained the following clause:

"16. My habits of life are correct and temperate, and I understand and agree that the policy to be issued on this application will not cover any accidental injury which may happen to me either while under the influence of narcotics or intoxicating drinks, or in consequence of having been under the influence of either."

The policy contains clauses making the amount due and payable to the plaintiff on account of death of her husband resulting from "injuries to the body caused by external, violent, and accidental means, within the meaning of the policy," and purports to be issued in consideration of the statement of facts warranted to be true in the application, and upon conditions printed upon the back of the policy, which the policy provides cannot be waived or altered by any agent. Among such conditions it is provided that the insurance does not cover a death resulting wholly or partly directly from intoxication, etc., or when affected by any such act, cause, or condition, or under its influence.

On the evening of February 28, 1889, Bigelow T. Cook was killed by falling upon a slippery sidewalk in front of his own house. The present action was brought to recover on the policy, and on the trial before a jury in the Muskegon circuit court the plaintiff had verdict and judgment for the amount claimed under the policy. Defendant brings error

In the notice attached to the plea of the general issue, it was claimed that Cook, when he made the application, was in the habit of using intoxicating drinks to excess,

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and concealed such fact from the defendant when applying for the policy, and that his death was not occasioned by bodily injuries effected through accidental means, within the meaning of the policy, but that the same happened while he was under the influence of intoxicating drinks.

It appears that Mr. E. W. Eadus was the local agent of the defendant company at Muskegon, and took the application and issued the policy in question. He was acting under the State agent, Mr. J. T. Patton, who furnished him with blank applications and a book of blank policies, which Eadus filled out and delivered to parties when receiving the applications. It appears that before that time, and on May 9, 1887, Eadus had taken an application from Cook of like tenor, and issued to him a policy of like terms and conditions, for the same amount, which was to continue in force one year from that date. During the life of that policy, Mr. Cook met with an injury which resulted in his being laid up for some time, having a claim against the company for several weeks' indemnity. While Mr. Cook was suffering from this injury, Mr. Patton, the State agent of the company, visited Muskegon. Mr. Eadus, on the trial of this case, when called as a witness for the plaintiff, testified that at the time Patton was at Muskegon, which was before the present application was taken or the policy issued, he told Patton that in his opinion Cook was under the influence of liquor when he met with the accident; that he tried to have Cook admit that he was, and that Cook had told witness that he wanted an accident policy to cover him that would protect him in any place he might go, and any condition he might be in. He also told Patton on that occasion that Cook had told him he did not want a policy unless it would protect him in any condition he might be in. He also told Pat-

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ton at that time that Cook was a drinking man, drank every day, but seldom became intoxicated; and Patton asked if Cook was a man that was liable to get into trouble over his intoxication, and witness told him, "No." Eadus also told Patton that Cook would be satisfied with eight weeks' indemnity, or $200, and asked him:

"While you are here this time, what shall I do about renewing the policy again?" When Patton said, "Yes, renew the policy. He is $175 ahead, or will be when we pay this claim, and the only way to get even is to keep on insuring him, and then we can consider about stopping when we get even."

This statement of Eadus is denied by Mr. Patton. He claims that he had no knowledge of the condition of Mr. Cook, or of his habits of drinking, and was not advised by Mr. Eadus; that he had no authority from the company to waive any of the conditions in the printed application, or of the policy, and that Eadus had no such authority; that the company had nothing to do with Mr. Eadus; that Eadus was under his authority and supervision.

Two questions were submitted on this subject to the jury by the plaintiff for special findings, and they found as follows:

"*Q.* Did the local agent, E. W. Eadus, at the time the policy in suit was issued, have knowledge that the habits of Bigelow T. Cook were not correct and temperate?

"*A.* Yes.

"*Q.* Did the State agent of defendant, J. T. Patton, direct and advise the local agent, Eadus, to reinsure Mr. Cook after Eadus had told him he thought Cook was intoxicated at the time he was injured in February, 1888?

"*A.* Yes."

It is not strenuously contended but that Mr. Cook was a person in the habit of getting intoxicated at the time

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the application was made, but it is insisted that, although he stated in his application for the policy that his habits of life were correct and temperate, the agent having knowledge of his habits in that regard, and after such knowledge having issued the policy and received the premium, thereby causing Cook to rely upon the policy as valid, the company is now estopped from setting that fact up to defeat a recovery on the policy; that this knowledge of the agent of the company in relation to the habits of Mr. Cook in indulging in intoxicating liquors is the knowledge of the company, and operated as a waiver of the conditions of the policy relating to intoxication, and estopped the defendant from asserting, as a defense to the suit, that Cook was intoxicated at the time he met with the injury. In support of this contention, counsel cite *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202; *Aetna, etc., Ins. Co. v. Olmstead*, 21 Id. 246. But it will be found on an examination of those cases that the power of the agents was in no manner limited by the terms of the policies themselves.

In the present case, the policy provides that the agent of the company cannot waive or alter any of the agreements and conditions printed on the back of the policy. This question was fully discussed by Mr. Justice MORSE in *Cleaver v. Insurance Co.*, 65 Mich. 527, 532, and it was there said:

"It cannot be successfully maintained but that the company has the right and the power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law or equity, why such limitations and restrictions shall not be considered as known to the insured, and binding upon him. * * * When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent

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has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon the powers in the agent in opposition to the limitations and restrictions in the policy."

This doctrine was laid down and adopted by this Court after a careful consideration of that case, and I see no good reason for departing from it. The general doctrine is well expressed in *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Miller v. Insurance Co.*, 27 Iowa, 203:

"Insurance companies who do business by agencies at a distance from their principal place of business are responsible for the acts of the agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge."

The court below on the trial proceeded upon the theory that notice to Mr. Eadus or to Mr. Patton was notice to the company, and charged the jury that the defendant had a right to waive the conditions of the policy, and that, by issuing the policy to Mr. Cook with this knowledge on the part of its agents, and receiving the premiums, it waived the conditions relating to intoxication. This was not a statement of the law applicable to this case as laid down in *Cleaver v. Insurance Co.*, *supra*, and to which we must adhere.

It may be contended, however, that this statement from the court did not prejudice the rights of the defendant, as the jury found specially upon questions presented by the defendant as follows:

"*Q.* Was Bigelow T. Cook, the insured, under the influence of intoxication at the time he received the injury mentioned in plaintiff's declaration?

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"*A.* No.

"*Q.* Was Bigelow T. Cook, the insured, under the influence of intoxicating drinks at the time he received the injury mentioned in plaintiff's declaration?

"*A.* No.

"*Q.* Did intoxicating liquors drank by Bigelow T. Cook during the day of his death in any manner cause him to be more liable to the accidental injury in question by falling than he would have been had he not drank such liquor?

"*A.* No."

In view of the written request to charge framed by plaintiff's counsel, and given by the court, it is manifest that the charge as given by the court upon the question of waiver by the company of the conditions as to intoxication may have had its influence upon the jury. The court was asked by the plaintiff's counsel to instruct, and did so instruct, them that if they found from the evidence that the death of Mr. Cook was effected through violent, external, and accidental means, and if they believed the testimony of Mr. Eadus, they should render a verdict in favor of plaintiff for the amount of the policy, and interest at 6 per cent. from July 24, 1889, to date; that is, the jury were told, in substance, that if they found that Eadus knew that Cook was in the habit of getting intoxicated, and communicated that fact to Patton, this was notice to and knowledge of the company, and if his death was effected by violent, external, and accidental means the plaintiff could recover. This left out one important element which it was necessary for the plaintiff to show in order to recover, for by the terms of the policy it is expressly stipulated that the insurance does not cover death nor injury resulting wholly or partly directly from intoxication. There was some evidence in the case that Mr. Cook had been in the habit of drinking, and, if the testimony of Eadus is true, to excess, for some time prior to his death. It was also shown that on the day of his

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death he had drank to some extent while at Grand Rapids, even as late as half past 2 in the afternoon. The court was in error in this part of the charge, and we think it may have had its influence upon the jury.

There are several other errors assigned, some of which we shall discuss, as the case must go back for retrial. The defendant sought to show that Cook was under the influence of liquor at the time of his injury, and, among other questions of similar import, asked the witness Jones, who drove him home on that night,—

"Were you impressed with the idea at that time that it was necessary for some one to go and drive him over on account of his condition?"

This was objected to as incompetent, and ruled out. This was error. The question was a proper one in view of the issue being tried, and as a part of the cross-examination. This was the proof of a fact, and something more than mere opinion. A witness may state whether or not a person had the appearance of being intoxicated, and such statement of appearance would be the statement of a fact. Sanity, intoxication, and state of health, or of the affections, are facts of this character. *People v. Eastwood*, 14 N. Y. 562; *State v. Pike*, 49 N. H. 407.

For the purpose of showing the condition of the deceased during the day and evening, defendant called as a witness Mr. Gunn, and asked him the following question:

"In your judgment was he in as good condition to take care of himself in walking and in avoiding danger from falls on a sidewalk, partly covered with ice and snow, as though he were sober?"

The following question was also asked of defendant's witness Peterson:

"Was he drunk or sober that night at that time?"

This was ruled out. These questions were admissible

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under the rule above laid down. In fact, this was one of the vital questions in the case. If his death was caused or affected by his intoxication, then, under the terms of the policy, no recovery could be had. That was one of the very things the company was guarding against by the insertion of these conditions in the policy. It was an error to exclude these inquiries.

Plaintiff was permitted, under objection, to read in full to the jury the proofs of death which the policy required the plaintiff to furnish. It was claimed by counsel that the only purpose in reading them was to show that they were received by the company, and when received, and also for the purpose of showing that the claim was received and declined on the same day. As a part of the proofs of death, there was an affidavit of an eye-witness, the physician's statement, and certificate of the coroner. There was no contention on the part of the defendant but that the preliminary proofs had been furnished in full compliance with the terms of the policy, and it was error to allow them to be read in full in the presence of the jury. These were *ex parte* affidavits and statements, and they may have had their influence upon the jury, and have been taken by them as proof of the facts therein contained. There can be no doubt that had the proofs offered been contested by the defendant on the ground that they were not in full compliance with the requirements of the policy, as preliminary proofs of death, counsel would have had the right not only to put them in evidence, but to have read them to the court, but they were matters in which the jury were in no way concerned. Whether they complied with the requirements of the policy was for the court, and not for the jury.

The judgment must be reversed, with costs, and new trial ordered.

The other Justices concurred.

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JOHN RILEY v. LOUIS B. LITTLEFIELD.

Replevin — Declaration — Damages — Depreciation in value — Entry fees of race-horses.

1. Whether the property was unlawfully taken or is wrongfully detained, the declaration is in the same general form, and under it every question can be tried that is triable in the action of replevin; citing *Elliott v. Whitmore*, 5 Mich. 532.
2. In replevin for a race-horse seized by a sheriff on an attachment, the plaintiff may recover damages arising from his depreciation in value by reason of not being properly cared for.
3. In such a case the plaintiff cannot recover as damages entrance fees and fines demanded by the trotting association under its rules as a condition to the entry of the horse in *future* races, the same having been paid after the horse was attached, he having been entered in certain races in which he failed to start by reason of such attachment.

Error to Wayne. (Hosmer, J.) Argued October 14 and 15, 1890. Decided December 24, 1890.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Sloman, Berry & Duffie (*William F. Atkinson*, of counsel), for appellant.

George W. Radford, for plaintiff.

LONG, J. This is an action of replevin of a race-horse known as "Dr. West," and of which defendant, as sheriff of Wayne county, was in possession under certain writs of attachment issued out of the Wayne circuit court against the goods and property of one Clifton E. Mayne, of Omaha, Neb.

The plaintiff claimed to have obtained the horse of Mayne in May, 1888, in trade of a mare named "Delle

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Murray," valued at $1,500; the mare's colt valued at $1,000; and a filley, valued at $1,000. After the trade, Mayne still owed the plaintiff something over $8,000, when, in June following, plaintiff claims that Mayne turned over to him two other horses, known as "Tommy Linn" and "Dan D." A bill of sale was given by Mayne to him in June of all three horses. This bill of sale was recorded in the office of the county clerk of Douglas county, Neb., on June 14, 1888, being the county in which Mayne and plaintiff both resided. This bill of sale is as follows:

"Clifton E. Mayne to John Riley.

"Know all men by these presents, that I, C. E. Mayne, of the county of Douglas, state of Nebraska, of the first part, for and in consideration of the sum of $10,000, lawful money of the United States to me in hand paid at or before the ensealing and delivering of these presents, by John Riley, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto said party of the second part, his executors, administrators, and assigns, the bay horse, 8 years old, known as 'Tommy Linn;' the dark bay horse, 10 years old, known as 'Dan D.;' and the dark bay horse, 8 years old, known as 'Dr. West,'—belonging to me, and now in the possession of James Newbro for racing purposes through the different trotting and pacing circuits. To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever; and I do, for myself, my heirs, executors, and administrators, covenant and agree to and with said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby, and unto the said party of the second part, his executors, administrators, and assigns, against all and every person or persons whomsoever.

"In witness whereof I have hereunto set my hand and seal this 12th day of June, A. D. 1888.

"CLIFTON E. MAYNE."

Under this bill of sale plaintiff claims to have taken possession of the horses at East Saginaw, this State, in

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July, 1888, a week before they were taken under the writs of attachment in Detroit, and that he was in possession at the time the attachments were served, and so notified the sheriff.

The declaration is in the ordinary form in replevin, claiming damages $10,000. The horse, during the time he was detain by the sheriff,—a month lacking two days,—was kept in the livery barn of one Watson, in Detroit, and plaintiff claims that he did not receive proper care and attention, by reason of which he depreciated in value. It was also claimed by the plaintiff that the horse was entered before the attachment for the races at Cleveland, Buffalo, and Chicago, which occurred during the months of July and August; that he paid $200 entrance fees at Chicago after the attachment, and before the races, and was obliged to pay $100 entrance fees at Buffalo after he obtained possession of the horse, and before he could be permitted to take part in other races, and was fined $10 at Buffalo, as, under the rules of the association, if a horse was entered in the race, and did not take part, he is fined, and the owner and horse are suspended from taking part in any race until all moneys and fines are paid, all of which moneys plaintiff claims to have lost by reason of his horse having been held under the attachments. The horse was taken into the plaintiff's possession under the writ of replevin, and on the trial the plaintiff had verdict and judgment finding the title in him, and also damages for detention to the sum of $1,310. Defendant brings error.

The defendant's contention on the trial was that the sale of the horse to the plaintiff was a mere sham, and the bill of sale a pretext to aid Mayne, so that, if in his rounds over the trotting circuits Mayne's horses were levied upon, the plaintiff could come forward with the pretended bill of sale and claim them.

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A great many errors are assigned, and the brief of counsel for the appellant contains many pages dwelling upon questions of fact which were properly submitted to and passed upon by the jury, and which it is not our province to consider. The whole case was submitted to the jury upon the theories of the respective parties, and we think it a fair submission as to the title and ownership of the horse in controversy. The charge put the burden of proof upon the plaintiff to establish his title, and the jury were instructed that, if the horse was transferred to the plaintiff in good faith, he was entitled to recover.

The main question under the charge as presented by this record arises upon the question of damages which the plaintiff was permitted to and did recover in the case. These elements of damages have been set out as claimed by the plaintiff. The court directed the jury that if the plaintiff paid this $310, and was debarred from getting into the races by reason of the attachment, he would be entitled to recover this amount; and also, if the horse depreciated in value in the hands of the sheriff by reason of not being properly cared for, he would be entitled to recover the damages arising therefrom. Upon this last proposition there can be no question. There was some evidence to go to the jury, and we think the question fairly submitted under the charge of the court.

It is contended, however, by the defendant that the court was in error in instructing the jury that the $310 was a proper element of damages which might be awarded the plaintiff under the facts stated.[1] It is claimed, first, that this element of damages could not be recovered under the ordinary form of declaration in replevin. If these damages were recoverable at all, the declaration is proper

[1] Counsel for defendant cited *Mizner v. Frazier*, 40 Mich. 592; *Talcott v. Crippen*, 52 Id. 638; *Aber v. Bratton*, 60 Id. 357; *Bateman v. Blake*, 81 Id. 227.

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in form to allow the recovery under the provisions of the statute. How. Stat. §§ 8337, 8341. Both these provisions of the statute were construed by this Court in *Phenix v. Clark,* 2 Mich. 329, and *Elliott v. Whitmore,* 5 Id. 537. In this last case it was said:

"Whether the goods be unlawfully taken or wrongfully detained, the declaration is in the same form, and under it every question can be tried that is triable in the action of replevin."

Plaintiff's counsel claims that the recovery was not for the fine imposed in not letting the horse take part in the races, but that, under the charge, the court confined the damages to the amount of depreciation in the value of the horse by reason of not being properly cared for, and the entrance fees which the plaintiff lost by reason of the detention of the horse by the sheriff under the writs. This part of the charge is as follows:

"If you come to the conclusion that Riley was entitled to the possession of the horse, that the sale was made in good faith to him, as he has told you, why then he will be entitled, gentlemen of the jury, to such damages as he has suffered by reason of the detention of the horse here in the possession of the sheriff. What those damages amount to is for you to say, if you find that he was damnified. You have heard the testimony as to the care of the horse, as to the horse being out of condition; you have heard all the testimony upon that point. It is for you to say, gentlemen of the jury, from that testimony, what Mr. Riley suffered, if he suffered anything. There has been evidence which had a tendency to show that the horse was somewhat out of training; that he had increased in weight; and that in consequence of that, as well as in consequence of his detention in Detroit, he was barred from entering certain other races during the racing season of last year. Now, what did he suffer by reason of those damages? Obviously, if he was prevented from entering those races, from starting in those races where he had already entered, or where he had paid the money, or was obligated to pay the money,—and I think that the testimony in this case

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shows, has a tendency to show, that he afterwards paid some $310 for *entrance* in which he was not able to start by reason of his detention in Detroit,—why, I say, gentlemen of the jury, obviously, if he was debarred, he would be entitled to recover those *entrance fees*, which I think amounted to, as I said before, $310. I may be mistaken in the sum, gentlemen of the jury. If I err in stating that to you as the sum, you, in your judgment, will correct me, remembering what the testimony shows upon that point. And also, if you find that Mr. Riley is entitled to recover in this case, give him such damages as he has suffered, any further damages that he has suffered, by reason of the detention of the horse. If the horse was depreciated in value by reason of the detention in the hands of the sheriff, why then you shall ascertain what amount he was depreciated in value, and assess the damages accordingly."

Under the testimony in the case, and the claim made upon the trial by counsel for the plaintiff, the charge does not bear the construction for which he contends. The plaintiff was called as a witness in his own behalf on the trial, and the following appeared from his testimony and the offers of his counsel while he was on the witness stand: From the plaintiff's testimony it appears that the horse was entered for races at Cleveland, Buffalo, Chicago, and Detroit during the months of July and August. Those races occurred between the time of the attachment and when plaintiff got possession of the horse under the writ of replevin, so that the horse was kept out of these races. He had paid the entrance fees at some of these places. He paid $200 in Chicago after the horse was attached, and before the races, and $110 before he could start the horse at Omaha. This $310 was paid in races in which he was entered, but did not compete. Mr. Radford, plaintiff's counsel, in explanation of this, stated to the court as follows:

"He was obliged to pay $310 under the rules of the association, because he had been entered at those places and did not appear, before he could proceed any further."

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This was not money paid before the horse was attached, but after the attachment, and before the possession of the horse was regained under the writ; that is, the plaintiff having entered the horse, and not paying the entrance money at the time of entry, and failing to start the horse in the race, the moneys were demanded and payment compelled before he could enter or start him in other races. The plaintiff explained the matter in this way:

"That when you enter your horse in the association for trotting purposes, if you do not propose to take part in them, and to pay the entrance, you are fined if you do not pay the entrance, and that horse and the party entering him and the owner of the horse are all suspended from taking part in any races on the association tracks until all the money is paid up, with fines, which is ten per cent. of the entrance money."

It appears that the $10 paid was for such fines for failing to start at the Buffalo races. One hundred dollars entrance fees were there paid after the attachment, and $200 paid in entrance fees at Chicago after the attachment. These moneys were all paid, not for the entrance for the purpose of trotting the horse in those particlar races, but in order to be permitted to enter and take part in other races in the future. This was in the nature of a penalty imposed under the rules of the association. It does not matter whether or not these penalties could lawfully have been imposed as a condition precedent to his entering the horse in future races, so far as the rights of the plaintiff and the trotting association are concerned; they are not such damages as the plaintiff would have a right to sue and recover for by reason of the unlawful detention of the horse. If this could be taken as a part of the plaintiff's damages against the officer, then whatever terms the association might impose as a condition precedent to entry in other races might be recovered for. Such damages are too remote, even if they could be recovered at all

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under the provisions of How. Stat. § 9387. Let us suppose the horse entered at Buffalo, Detroit, and Omaha for the July and August races, the entrance fees being $100 in each place. The horse is unlawfully detained by the officer under a writ of attachment beyond the time when the races are to come off. The plaintiff desires to enter him in a future race at Chicago, but, in order to do this, he is compelled to pay the entrance fees at Buffalo, Detroit, and Omaha, though the horse did not start in those races. The association may have the right, under its rules, to impose these terms as a condition precedent to letting the horse in at the Chicago races. In an action against the officer for the unlawful detention, it could not be said that this would fix, or in any degree tend to fix and determine, the damages which the officer must pay, for, if the association could fix and determine it by the amount of the original entrance fee, it could as well fix any other standard, and make the amount $1,000 or $10,000, and, being so fixed, it would measure the liability of the officer for such detention. The court was in error in permitting the recovery of these damages under the circumstances here stated.

Some errors are assigned upon the rulings of the court in the admission and rejection of evidence. We have examined those questions, and do not deem it important to discuss them. The trial seems to have been a fair one upon the main issue, and the evidence objected to admissible under the claimed facts.

For the error pointed out, the judgment must be reversed, with costs.[1]

[1] At the January term, 1891, plaintiff moved that the judgment of reversal be set aside, and the judgment below reduced to $1,000, with interest, and affirmed, which motion was denied, the record not showing upon what theory the jury proceeded in awarding damages.

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CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred with LONG, J.

CAHILL, J. I concur in the result. I do not think such damages as were sought to be recovered in this case can be recovered under the general declaration in replevin.

CHARLES CORBETT v. LOUIS B. LITTLEFIELD.

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Chattel mortgage—Filing—Conflict of laws—Priority of lien.

A resident of Nebraska gave a chattel mortgage to a resident of the same state, who filed it under the law of that state, and left the property in the possession of the mortgagor, who brought it to Michigan without the knowledge or consent of the owner of the mortgage, where it was attached at the suit of the mortgagor's creditors. And it is held that the attachment lien must prevail over that of the mortgage. *Montgomery v. Wight*, 8 Mich. 143; *Boydson v. Goodrich*, 49 Id. 66.

Error to Wayne. (Hosmer, J.) Argued October 15, 1890. Decided December 24, 1890.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Sloman, Berry & Duffie, for appellant, contended for the doctrine stated in the head-note, and cited the authorities therein cited.

George W. Radford, for plaintiff, contended for the doctrine stated in the charge of the trial judge, citing no authorities.

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LONG, J. This is an action of replevin to recover possession of two horses, known as "Tommy Linn" and "Dan D." The action is brought against the defendant, sheriff of Wayne county, who held them under three writs of attachment issued against the goods and chattels of Clifton E. Mayne. The cause was tried in the Wayne circuit court before a jury, where the plaintiff had verdict and judgment for six cents' damages, he having taken the property under the writ.

The plaintiff on the trial claimed to be entitled to the possession of the property by virtue of a chattel mortgage given by Clifton E. Mayne, the defendant in the attachment suits. The mortgage was given on July 15, 1887, to George E. Barker, and assigned by Barker to the plaintiff on May 2, 1888. At the time the mortgage was given, Mayne, the mortgagor, resided at the city of Omaha, Douglas county, Neb., and Barker, the mortgagee, resided at the same place. The mortgage covered other property besides these two horses, and the property is described in the mortgage as being upon the ranch of C. E. Mayne, called the "Platte Valley Stock Ranch," in township 16 N., range 9 E., of Douglas county Neb. The mortgage was duly filed in the office of the county clerk of Douglas county, Neb., on October 1, 1887.

The statute of Nebraska authorizing the filing in the county clerk's office was offered in evidence, and is as follows:

"Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors [mortgagees] in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the

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same resides, or, in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage; and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid as if the same were fully spread at large upon the records of the county."

At the time the mortgage was assigned by Barker to Corbett, the two horses in question, and also a horse known as "Dr. West," were out of the state, in the possession of a man named Newbro, who had them in the trotting circuits for Mayne in the different states. They have never been returned to Nebraska, and were on the trotting circuit in Michigan at the time they were attached for the debts of Mayne.

On June 12, 1888, it is claimed, Mayne sold the horses to one John Riley, and gave Riley a bill of sale, subject to the chattel mortgage then held by Corbett; and Riley made an agreement, it is claimed, with Corbett to release the chattel mortgage on the horses by the payment of $1,000; and it was claimed on the trial that Riley had possession of the horses at the time they were attached. It also appears that on May 1, 1888, an agreement was entered into between Corbett and Mayne, by which Mayne acknowledged the validity of the claims for which the mortgage was given, and authorized Corbett to purchase them.

On the part of the defendant it was contended—

1. That the mortgage was fraudulent in fact.
2. That, even if not fraudulent in fact, it was void as to those attaching creditors of Mayne, for the reason that it was not filed in Detroit or in Michigan.
3. That the bill of sale to Riley was nothing more than a mortgage, and a fraudulent one at that.

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These were the issues which were presented to the court and jury. On the trial below, many of the questions raised were questions of fact, which, under the charge of the court, were fairly submitted to the jury for determination. Sixteen requests were presented by defendant's counsel to the court to give in charge to the jury, the most of which relate to the necessity of the refiling of the mortgage in this State. Some of those were covered by the general charge of the court, and others were not given and were refused.

The important question in the case arises under the defendant's second point that the mortgage was not filed in this State, and many of the requests to charge were aimed at this point. The court in its charge to the jury, giving construction to the Nebraska statute relative to chattel mortgages, directed the jury that they must hold the chattel mortgage as fraudulent and void, as the property remained in the possession of the mortgagor, unless the plaintiff had shown by a preponderance of evidence that it was an honest security, and not taken with intent to hinder, delay, or defraud the creditors of Mayne; but if they found that the agreement of May 1, 1888, between Corbett and Mayne, by which Corbett was induced to purchase the mortgage, was executed in good faith, for the purpose of procuring Corbett to purchase the mortgage, then, though the mortgage was fraudulent in its inception as between Barker and Mayne, the mortgage as to Corbett would be valid, if Corbett, relying upon the representations made in the agreement, and acting in good faith, purchased it.

The court further in its charge, speaking of the Michigan statute relative to the filing of chattel mortgages, directed the jury that, though they found the mortgage valid in the hands of Corbett, yet, if he permitted the

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property to be brought into this State, it then became subject to the levy of the attachments in the hands of the sheriff, and the chattel mortgage would be no protection to the plaintiff, as the mortgage was not filed within this State; but that, if the property was brought out of the state of Nebraska, and into the State of Michigan, without the knowledge or consent of Corbett, and as soon as he found that it had been brought out of that state, and into this, he took steps to reclaim it, then his rights as mortgagee would be preserved.

Upon the question of the rights of Mr. Riley under the bill of sale, the court directed the jury that if the bill of sale was made in good faith, and not with intent to hinder, delay, or defraud creditors, and that, acting under the conveyance, Riley took possession of the horses in this State, that would end the case, though the chattel mortgage was fraudulent and void as between Corbett and Mayne, as they could not be attached for the debts of Mayne, though the sheriff would then be entitled to nominal damages. Substantially these are the material parts of the charge.

The jury, by their verdict, have found that the property was brought out of the state of Nebraska and into this State without the knowledge or consent of Corbett. The question is therefore presented whether this chattel mortgage can be held to protect the plaintiff's rights in the property, even though not filed within this State, by reason of the bringing of the property out of Nebraska and into this State without the knowledge or consent of the mortgagee.

Our statute (section 6193, How. Stat.), like the Nebraska statute, provides that such conveyances shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in

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good faith, unless filed, where there has been no delivery of the property to the mortgagee, and that followed by an actual and continued change of possession of the thing mortgaged. The filing, to be effective, must be in the town-clerk's office, or city clerk of the city, or recorder of the city, having no officer known as "city clerk," where the mortgagor resides, except when the mortgagor is a non-resident of the State, in which case the mortgage is to be filed in the clerk's office where the property is. The relation between the mortgagor and mortgagee is that of debtor on one side and creditor on the other, secured by a lien upon the property of the debtor. The title to the property can only be divested by foreclosure or some act equivalent thereto.

It may be true that this mortgage lien was valid in Nebraska, and might have been enforced there as against creditors, or even purchasers in good faith. It is the duty of courts to extend the principles of comity to our sister states, and to recognize generally the existence of liens under foreign statutes. But we are asked to give this mortgage priority of lien over the attachment levies. The recognition of the existence and validity of such liens by the foreign state is not to be confounded, however, with the giving them a superiority or priority over all other liens and rights justly acquired in this State merely because the former liens in the state where they first attached have there, by force of their statute, a superiority or priority. This distinction was pointed out by Chief Justice Marshall in delivering the opinion of the Court in *Harrison v. Sterry*, 5 Cranch, 289. He there said:

"The law of the place where a contract is made is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It

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is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause."

There is no provision of our statute by which this mortgage at the time of its execution could have been filed in this State, and the Nebraska statute did not authorize it, and, even if it had, it would not have had any force beyond the sovereignty enacting it. The mortgagor then resided in Nebraska, and the property was situate there. It would be unreasonable to require a citizen of Michigan to take notice of the files and entries in Nebraska. These notices have no extraterritorial force. *Montgomery v. Wight*, 8 Mich. 143. The mortgage having been properly filed under the statutes of Nebraska, the lien thereby created would undoubtedly have been held by the courts of that state as prior to any lien which creditors might acquire, if the mortgage was not fraudulent in fact, though the mortgagor retained possession of the property mortgaged. But, by the terms of the mortgage, the mortgagee had a right at any time to take possession without notice, and Corbett, by the assignment, acquired all the rights which Barker had. Instead of taking possession, he permitted the property to remain in the possession and under the control of the mortgagor, thereby clothing him with all the *indicia* of ownership. This ownership, however, was subject to the lien of the mortgage so long as the property was kept in Nebraska, as the filing of the mortgage there was notice of the lien. But, when the property is moved into a foreign state, the filing in Nebraska cannot be said to be notice to creditors of the mortgagor in such foreign state of the lien of the mortgage, as that statute has no extraterritorial force.

The court was in error in holding that, the property being brought out of Nebraska and into this State, with-

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out the knowledge and consent of Mr. Corbett, such fact would give the mortgage lien priority over the attaching creditors. That question arose in *Boydson v. Goodrich*, 49 Mich. 66, and was expressly ruled the other way. In that case the plaintiff resided in Indiana. Warren, the mortgagor, also resided there, and the mortgage was given there. Without the knowledge or consent of the plaintiff, Warren, the mortgagor, brought the property into this State and sold it. In an action of replevin against the purchaser, it was said by this Court:

"Counsel for plaintiff argues that the rules of state comity are against the defendant, and give the foreign transaction preference. But the law seems to be settled otherwise in *Montgomery v. Wight*, 8 Mich. 143. * * * The plaintiff allowed the mortgagor to retain possession, and to appear to the world as well authorized to convey an unincumbered title, and no means of information were provided in this State to impeach this appearance."

In the present case it appears from the very terms of the mortgage that Mr. Corbett had it in his power to protect himself by taking possession of the mortgaged property. This he failed to do, but permitted the property to remain in the possession of the mortgagor, relying upon the filing of his mortgage as notice, under the Nebraska statute, sufficient to protect his lien. It can have no such effect here as against the creditors of the mortgagor, and the court should so have instructed the jury. We find no error in the other portions of the charge. We need not discuss the other questions raised.

The judgment must be reversed, with costs.

The other Justices concurred.

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ROBERT BALLENTINE ET AL. v. RAYMOND S. WEBB.

Nuisance—Maintenance of slaughter-house—Injunction.

The bill in this case was filed to enjoin *perpetually* the use of certain premises near the outskirts of the city of Detroit for slaughter-house purposes. The neighborhood was a new one, as a residence part of the city, and a cattle-yard and slaughter-house had been in operation for some years in the near vicinity when defendant established his business. In granting relief in a modified form, the Court state the following propositions:

a—The defendant's business is not of such a character as, when properly conducted, to constitute a nuisance in the neighborhood where it is situated.

b—The noise made by hogs kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify a court of equity in destroying defendant's business for the sole purpose of ridding a neighborhood of such noise.

c—Complainants are not entitled to a decree which would interfere with defendant's business on the ground that its existence in the neighborhood depreciates the value of their property; they having a complete remedy at law for that injury.

d—The decree below is defective in failing to specify *what* defendant is required to do in order to comply with its requirements. To adjudge 'that he is so to conduct his business as not to be offensive is to give him no rule of conduct which the law had not before prescribed. The decree should have specifically pointed out the things that he is required to do, and to refrain from doing, in order to abate the nuisance which the court found to exist.

e—Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes *injurious to health* that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it; distinguishing this case from *People v. Lead Works*, 82 Mich. 471.

f—Most of the complainants having moved into this neighbor-

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hood since the defendant's business was established, although entitled to be protected from nuisances that endanger the health of themselves or families, yet a court of equity, in determining whether it will destroy defendant's business at their request, will consider whether the thing complained of is *noxious* or only *disagreeable*, and the further fact that complainants have voluntarily put themselves into the disagreeable neighborhood; this rule being recognized by How. Stat. § 1643.

g—Under the general prayer for relief, complainants are entitled to a decree requiring defendant to remove from his premises daily all manure, blood, offal, hair, and other refuse of his establishment in covered garbage wagons, such as are in use in the city of Detroit, or in other wagons that will effectively avoid the spread of offensive odors; to thoroughly cleanse and disinfect his premises daily; to provide sufficient pens for the hogs in store, so that they shall not be crowded and rendered noisy and quarrelsome by discomfort while in confinement; and to use such other precautions as are necessary to render his place of business clean and wholesome.

Appeal from Wayne. (Hosmer, J.) Argued October 16, 1890. Decided December 24, 1890.

Bill to enjoin defendant from using certain premises for slaughter-house purposes. Complainants and defendant appeal. Decree modified and affirmed. The facts are stated in the opinion.

Parker & Burton, for complainants, contended:

1. When a complainant has shown that he lives in the neighborhood of a slaughter-house, he has made out a *prima facie* case, which, if not rebutted, entitles him to relief; citing *Com. v. Perry*, 139 Mass. 199; *Reichert v. Geers*, 98 Ind. 73; *Pruner v. Pendleton*, 75 Va. 516; *Catlin v. Valentine*, 9 Paige, 575.

Conely, Maybury & Lucking, for defendant, contended:

1. The remedy by injunction must be confined to that specific thing which constitutes the actual nuisance, as shown by the proofs; citing *Welch v. Stowell*, 2 Doug. 332; *Wreford v. People*, 14 Mich. 41; *Babcock v. Stock Yard Co.*, 20 N. J. Eq. 296.

2. Courts will rarely interfere by injunction where the nuisance may be stopped by indictment; citing *Railroad Co. v. Prudden*, 20 N. J. Eq. 536; and this is a case peculiarly appropriate for trial by jury; citing *Ronayne v. Loranger*, 66 Mich. 373.

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3. A lawful business, carried on in a suitable place, though to the annoyance of the neighbors, will not be enjoined; citing *Doellner v. Tynan*, 38 How. Pr. 182; *Gilbert v. Showerman*, 23 Mich. 448.

CAHILL, J. The complainants are the owners of, and occupy as residence property, lands in the northern part of the city of Detroit, lying between Trumbull avenue and Twelfth street, and between Merrick avenue and Kirby street. The neighborhood is a new one, as a residence part of the city, the complainants having for the most part moved there within a year prior to the filing of their bill in 1887.

In the spring of 1886, the defendant had erected a slaughter-house on the south-east corner of Twelfth and Kirby streets, the cost of which was something over $4,000. Before doing so, he testified that he had acquired permission from the common council. In the near neighborhood were King's cattle-yards and Wreford's slaughter-house, both of which had been in operation some years. Defendant was engaged principally in slaughtering hogs. The hogs were received by rail, and were unloaded from a side track near the slaughter-house to the number of about 300 a week. They were usually kept in the yard at least overnight, and sometimes 24 hours, to cool off before killing. Sometimes car-loads of hogs intended for King's stock-yards, as well as for the defendant, would stand upon the track for several hours at a time, and would make considerable noise by squealing.

Complainants allege in their bill that the swine confined in defendant's yards produce a large amount of manure and filth, and give off an offensive, sickening, and unwholesome stench, and that at times it becomes so unendurable that the inhabitants, of whom complainants form a part, are compelled to leave their homes; that the confined swine make a great disturbance and noise

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by squealing so loudly as to awaken persons from sleep, and so constantly as to disturb inhabitants at all times, both day and night. It is alleged that, in consequence of the business carried on by defendant, the land in the vicinity has become depreciated in value; and complainants charge that the stench arising from said swine, and from the drying hair taken from the slaughtered hogs, and from the said slaughter-house, constitutes a nuisance, and that the noise and disturbance made by said swine in confinement constitutes a nuisance; that such nuisances are greatly injurious to the health, comfort, and property interests of the complainants; that the injury to the complainants' health and comfort cannot be measured by monetary value; that the injury to their property interests is upwards of $5,000; and that for such injury to their health, comfort, and property, they are without any adequate relief except in equity.

The prayer of the bill is for preliminary and perpetual injunction to restrain defendant from further using or employing his property for a slaughter-house, wherein to slaughter swine, or any other animals, and from employing the same for the purpose of confining therein quantities of swine or other animals for the purpose of slaughtering them, and for using the same or any part of it as a drying-yard for drying hair or bristles taken from the slaughtered swine; also for general relief.

Defendant answered, admitting that he owned and operated the slaughter-house at the place stated in the bill, and for purposes substantially as charged, but denied that the place was uncleanly, or gave out noisome or unwholesome smells, or that the same was a nuisance in any way. Says that the slaughter-house had been erected, and was carried on, after the newest and most approved methods, and was kept as clean as is possible for such a place to be kept; that it had been constructed expressly

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for the purpose for which he was using it, and that if he should be prevented from making such use of it the value of the property, amounting to about $5,000, would be almost wholly destroyed; that, when defendant bought and built there, there were very few buildings in the neighborhood; and that, as yet, the neighborhood was sparsely settled.

The case was heard before Hon. George S. Hosmer, circuit judge, a large number of witnesses being examined on each side, and, the testimony being very conflicting. Upon the part of the complainants, the testimony tended to show that the people living in the vicinity of the defendant's slaughter-house were annoyed, especially during the summer months, by offensive smells coming from the direction of the defendant's place; that these smells were in some instances so offensive as to make the parties sick. It also appeared that people were kept awake at night by the squealing of hogs confined in defendant's yard. It does not clearly appear from the complainants' proof, however, whether the offensive smells of which they complain were such as were necessarily connected with a slaughter-house for the slaughtering of hogs maintained in a proper manner, or whether such smells were due to the improper conduct of the business, and in consequence of defendant's neglect to keep the place in as clean a condition as the same could be kept with proper care. There was evidence tending to show that defendant was in the habit of spreading the hair scraped from the slaughtered hogs upon the ground to dry before sending the same to market, and some of the witnesses thought that much of the unwholesome smell came from this hair.

On the part of the defendant, the testimony tended to show that great care was used by defendant to keep the place clean and wholesome; that the manure and other

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offal was removed every day by wagons to a distance in the country; that much of the noise with which complainants found fault came from the squealing of hogs standing in cars on the track intended for King's stock-yards. A considerable number of witnesses called by the defense, who lived in the neighborhood where defendant's business was carried on, testified that they had never noticed any offensive smells, and were never disturbed by the squealing of hogs.

The court below found as a fact that in the prosecution of the business conducted by the defendant he has, at various times, been guilty of maintaining a nuisance in the noxious and offensive odors from the confined swine, and from swine in the process of being slaughtered, and has also been guilty of maintaining a nuisance in the offensive odors from the drying hair and bristles taken from the slaughtered swine, and that at times, depending on the state of the weather or the direction of the wind, such nuisances have been unbearable. The decree, however, did not order the defendant to cease using the place as a slaughter-house altogether, but ⌜decreed that defendant refrain from using or employing the buildings and sheds erected on defendant's premises for the purpose of a slaughter-house wherein to slaughter hogs *in such a way as to be offensive to, or become a nuisance to, the complainants;* and that defendant desist and refrain from using or employing the said inclosure or buildings for the purpose of confining therein quantities of swine or other animals *in such a way as to be offensive to, or to be a nuisance to, the complainants, or any of them;* and that defendant desist and refrain from using said inclosure, or any part thereof, as a drying-yard in which to dry hair or bristles taken from the slaughtered swine.

The complainants were given leave to apply to the court for a further order enjoining or restraining defend-

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ant from using his premises in any wise for the purpose of slaughtering or confining swine, if it shall appear that the further use of said buildings and inclosure by said defendant be offensive or noxious to the complainants, or any of them, because of the noises arising from the swine, or because of disagreeable odors arising from the inclosure caused by confining swine therein.

From this decree, complainants and defendant have appealed.

On the part of the complainants, it is insisted that the decree falls short of giving them the relief to which they are entitled, because, having adjudged the defendant's business to be a nuisance, such judgment was not followed by an injunction perpetually restraining defendant from further carrying on such business. On the part of defendant, it is claimed that the complainants were not entitled to any relief under their bill and the proofs made, for the reasons:

1. That it does not appear from the bill that the defendant is maintaining such a business as is a nuisance *per se;* that it does not appear from the bill but that the offensive odors arise from causes which can be remedied without any serious interference with the conduct of defendant's business; that there is no allegation in the bill, and substantially no proof, that defendant's slaughter-house is of itself a nuisance.

2. It is claimed that the decree gave no relief to complainants, and that, upon facts found by the circuit judge, the bill ought to have been dismissed.

Without attempting to review the voluminous testimony in this record, we have arrived at the following conclusions:

1. That defendant's business is not of such a character as, when properly conducted, to constitute a nuisance in the neighborhood where it is situated. This is practically conceded by complainants; and, if it were not, we should

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not be willing to hold, as a matter of law, that a business so necessary and important as that in which defendant is engaged, and which his own profit and the convenience of the city require should be conducted within reasonable distance of the market which he supplies, was of necessity a nuisance, independent of the manner in which it was conducted.

2. The noise made by the hogs kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify a court of equity in destroying defendant's business for the sole purpose of ridding a neighborhood of such noise. We do not intend by this to intimate that we regard the squealing of pigs as a soothing sound. We have no doubt that such noises are more or less annoying to some people, depending somewhat upon their peculiar temperament. Some of complainants' witnesses testified that they did not notice the squealing of the pigs, which annoyed other members of the family. But in this age of steam and iron, the squealing of a pig is scarcely to be heard amid the multitude of greater noises that everywhere assault the ear. Within a short distance of defendant's place, and nearer to some of complainants than the slaughter-house, are the railroad tracks, over which run the engines with their shrieking whistles, louder than the squealing of a thousand hogs in chorus, and their automatic bells, rung at all times of the day and night, and yet none of the complainants would think of removing the railroad from their neighborhood because of the distressing noises which arise therefrom.

3. Complainants are not entitled to a decree which would interfere with defendant's business on the ground that the existence of it in that neighborhood depreciates the value of their property. As to such injury, if any, complainants have an adequate remedy at law. Wood,

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Nuis. (2d ed.) 946; *Attorney General v. Nichol*, 16 Ves. 342; *Zabriskie v. Railroad Co.*, 13 N. J. Eq. 314; 2 Story, Eq. Jur. § 925.

4. We are satisfied that defendant has not, at all times, conducted his business with as much care to cleanliness as he ought. His counsel urged that the testimony fails to locate any offense arising from the slaughter-house proper. If this be granted, we fail to see the force of it. Complainants are not required to discriminate nicely as to the origin of offensive smells. The evidence is convincing that they come from defendant's place of business, and his business must be regarded as including all that is incident to it. The defendant insists that this business can be carried on so as not to be injurious to the health, or seriously offensive, to complainants. The decree of the circuit court recognized this possibility, and undertook to give defendant time and opportunity to abate the nuisance complained of without requiring him to stop his business altogether. The trouble with the decree is that it fails to point out specifically what defendant is required to do in order to comply with its requirements. To adjudge that defendant should so conduct his business as not to be offensive is to give him no rule of conduct which the law had not before prescribed. The decree should have specifically pointed out the things that defendant was required to do, and to refrain from doing, in order to abate the nuisance which the court found to exist.

5. Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes injurious to health that the injury can be said to be irreparable so as to call

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forth the extraordinary power of a court of chancery to destroy it. So careful is the law of human life and health that no consideration of mere property rights can be allowed to weigh against them. As to other wrongs, they can, for the most part, be compensated in damages. In the recent case of *People v. Lead Works*, 82 Mich. 477, the rule in a case at law was stated by Mr. Justice GRANT as follow:

"The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with them. Whenever such a business becomes a nuisance, it must give way to the rights of the public, and the owner thereof must either devise some means to avoid the nuisance, or must remove or cease the business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is useful or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuis. § 19; *Queen v. Train*, 2 Best & S. 640; *Works v. Railroad Co.*, 5 McLean, 425; *Respublica v. Caldwell*, 1 Dall. 150; *Ross v. Butler*, 19 N. J. Eq. 296; *Robinson v. Baugh*, 31 Mich. 290.

"It is true that, in places of population and business, not everything that causes discomfort, inconvenience, and annoyance, or which, perhaps, may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort, and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was *Gilbert v. Showerman*, 23 Mich. 448."

In *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 205, the rule was stated more broadly:

"Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort

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physically of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life uncomfortable. * * * The only question is, what amounts to that discomfort from which the law will protect? The discomforts must be physical, not such as depend upon taste or imagination."

This language was used in a case where the court was asked to restrain the defendants from erecting or carrying on their gas-works at the place at which they had begun to erect them or in the neighborhood of that place, and although the court declined to grant the injunction on the ground that it did not clearly appear that the works, "when completed, would be a nuisance," the foregoing rule was clearly stated as one that would govern the court in dealing with the company should complaint afterwards be made. The facts in that case were that defendants proposed to erect their gas-works in a populous residence portion of the city of Newark, and such a case is to be distinguished from this, where defendant erected his place of business at the outskirts of the city, and in a locality where similar kinds of business were already established. Most of the complainants had moved into this neighborhood since the defendant's business was established; and, although they have a right to be protected from nuisances that endanger the health of themselves or their families, a court of equity, in determining whether it will destroy defendant's business at their request, will consider whether the thing complained of is noxious or only disagreeable, and in the same connection will consider the fact that complainants have voluntarily put themselves into the disagreeable neighborhood. The rule here contended for is recognized by our

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statute concerning the abatement of nuisances. How. Stat. § 1643.

Under the general prayer for relief, complainants are entitled to a decree requiring defendant to remove from his premises every day all manure, blood, offal, hair, and other refuse of his establishment in covered garbage wagons, such as are in use by the board of public works in the city of Detroit, or in other wagons that will effectively avoid the spread of offensive odors; to thoroughly clean, cleanse, and disinfect his premises daily; to provide sufficient pens for the hogs in store, so that they shall not be crowded and rendered noisy and quarrelsome by discomfort while in confinement; and to use such other precautions as are necessary to render his place of business clean and wholesome.

No costs will be awarded to either party in this Court. The decree below as to costs is affirmed.

CHAMPLIN, C. J., and LONG, J., concurred. MORSE and GRANT, JJ., did not sit.

CHARLES D. CARPENTER v. JOHN GREENOP, IMPLEADED WITH ROBERT A. LAVERY.

[See 74 Mich. 664].

Partnership—Bills and notes—Good-faith holder—Evidence.

One partner gave the firm note payable to his order, and transferred it after maturity and a few days prior to the dissolution of the firm. The transferee paid to the other partner soon after the alleged purchase sums of money largely in excess of the amount due on the note, and two and a half years after-

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wards brought suit on the note, claiming to be a *bona fide* purchaser. On the trial the partner who made the note testified that it was given for money loaned the firm with the consent of his co-partner, who denied its execution, and defended on the theory that no such loan was made, but that the note was a fraud upon him, and that the plaintiff was not a *bona fide* holder as against such partner, but that he had conspired with the other partner to procure the execution of the note to protect himself against indorsements he had made for him. And it is held that it was competent to inquire of the plaintiff on his cross-examination, as bearing upon the question of whether he in *fact* held the note at the time of making such payments, as he claimed to have done, and upon the further question of whether it was a *bona fide* note, and believed by him to be such, whether he had ever asked the partner making such defense for the money sued for.

Error to Mecosta. (Palmer, J.) Argued October 17, 1890. Decided December 24, 1890.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Dumon & Cogger and *M. Brown,* for appellant.

D. F. Glidden and *F. A. Mann,* for plaintiff.

CAHILL, J. This case was before this Court at the April term, 1889, and is reported in 74 Mich. 664. At that time the only question raised was as to whether the plaintiff, as the holder of a note made by one of two partners in the partnership name, could maintain an action at law upon such note. None of the questions raised upon this record were then involved.

The plaintiff claims to have purchased in good faith, but after maturity, a note of John Greenop & Co., payable to the order of Robert A. Lavery, and indorsed by Lavery. Lavery was a member of the firm of John Greenop & Co., and made the note. The note was dated January 21, 1883, payable in six months. It was trans-

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ferred to plaintiff in August, 1884, while the firm of Greenop & Co. was still in business, and this suit was commenced in February, 1887.[1] Defendant John Greenop pleaded the general issue, and, with his plea, filed an affidavit denying the execution of the note. Defendant Lavery made no defense, but was sworn in the case as a witness for plaintiff. On the trial before the court and a jury, the plaintiff had judgment, and defendant Greenop brings error.

A large number of errors are assigned, not all of which are insisted upon here. It was the theory of the plaintiff that the note in suit was given for money loaned by Lavery to the firm on January 22, 1883. The note bears date January 21, which was Sunday, but Lavery testified that the note was made on Monday, and, if it was dated the 21st, it was a clerical error. He also testified that this money was loaned to the firm with the consent of Mr. Greenop. It was the theory of the defense that no money was loaned to the firm of Greenop & Co. by Lavery; that the note was in fact a fraud upon Mr. Greenop, and that the plaintiff conspired with Lavery to procure the execution of this note, in order to protect himself against some indorsements that he had made for Lavery; that the plaintiff was not a *bona fide* holder of the note as against Greenop. As bearing upon this theory of the defense, plaintiff was asked on cross-examination the following question:

"*Q.* Did you ever ask Mr. Greenop for this money?
"*Mr. Glidden.* That is objected to as not cross-examination."

The objection was sustained. Upon this ruling is based defendant's second assignment of error. There was that appearing on the cross-examination of the plaintiff himself which gave color to the defendant's claim that plaint-

[1] The firm was dissolved September 1, 1884.

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iff was not a *bona fide* holder of this note, and that, for some reason best known to himself, he had neglected to call the attention of Mr. Greenop to it for several years after he claims to have bought it. If he had called Mr. Greenop's attention to it as soon as he obtained it, it being then long past due (the firm of Greenop & Co. had not at that time been dissolved), it would have been possible, perhaps, for Mr. Greenop to have protected himself in his final settlement with Lavery upon a dissolution. It appears that, a few days after plaintiff claims to have bought this note, he paid Mr. Greenop $880.59 in money, and, in October following, paid him $670.86 in money, and transferred to him $1,000 in bank-stock, in payment of a debt. During this time he claims to have held this note. As bearing upon the question of whether he did in fact hold this note, and upon the further question of whether it was a *bona fide* note, and believed by him to be such, it was competent to ask him whether he ever asked Mr. Greenop for the money. Whether he did or not would have been an important fact for the jury to consider, in passing upon the truth of his evidence, as to the manner in which he became the purchaser of it.

As bearing upon this same point, the twenty-fourth assignment of error must be sustained. The court charged the jury as follows:

"The fact that Mr. Carpenter bought this note is a conceded fact; no matter whether he paid more or less for it."

If by this the learned circuit judge meant to say that it was a conceded fact that Lavery transferred this note to Carpenter, his language would not have been objectionable; but if he intended to say to the jury that it was a conceded fact that Carpenter bought the note in the sense of being a good-faith purchaser, without any

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knowledge of or participation in any fraud that may have been perpetrated by Lavery upon Greenop in making the note, that fact was not conceded, and it is only in that sense that it was material to speak of Carpenter as having bought the note at all. It is true that defendant Greenop was allowed to make any defense to the note which he could have made if it had remained in the hands of Lavery, and the jury were instructed that the plaintiff could not recover unless they were satisfied that the note was a valid one at its inception. Yet we think, under the claim made by defendant, any testimony that tended to show bad faith in the plaintiff tended also legitimately to taint the transaction from the beginning, and to support the theory of the defense that the making of the note was in the first instance without consideration, and a fraud upon Mr. Greenop.

The conduct of the plaintiff in holding this note for the length of time he claims to have held it, the payment to Mr. Greenop of the considerable amount of money that he admits paying him, and the transferring to him of valuable securities, is hardly consistent with his statement that he at that time held his note long past due. He makes no explanation of this, and, when asked whether he ever said anything to Mr. Greenop about the note, his counsel objected, and the testimony was excluded.

It will not be necessary to refer in detail to the other assignments of error relied on. It is sufficient to say generally that the other assignments of error are overruled.

For the errors pointed out, the judgment must be reversed, and a new trial granted.

CHAMPLIN, C. J., and LONG, J., concurred. MORSE and GRANT, JJ., did not sit.

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86	568
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108	688
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154	527

THE VILLAGE OF GRANDVILLE v. LUMAN JENISON AND LUCIUS JENISON.

Highways—Encroachment—Bill in equity—Parties—Dedication—Acceptance—User—Evidence.

1. Several persons who are encroaching upon a public street, but who are in no way connected with or dependent on each other in such action, need not be joined as defendants in a suit to remove an obstruction maintained by one of them.
2. The failure by the public for 20 years to accept an offer by land-owners to dedicate land for a street, and its occupancy for 14 years more, by the owner of the land to which the easement was appurtenant, in such a way as to indicate a denial of any right of the public therein, will estop the public from asserting such right. *Field v. Village of Manchester*, 32 Mich. 281.
3. The adoption by the public of a road laid out in *fact*, but not legally under the statute, and its use to the full extent that the public had occasion to use it for the statutory period, will constitute it a highway by user under Comp. Laws 1871, § 1268.
4. Evidence of the general understanding in the community that a certain street in public use was a highway, and of the refusal of the supervisor to assess the land so used, although requested to do so, on the ground that it was a highway, is admissible to show its public character.
5. The rights of the public in a highway will not be lost by anything short of an actual abandonment of the use by which they secured it.
6. The statute does not fix the number who must travel upon a highway in order to determine whether it exists by user. It must be *used* by the public, and the public are all who have occasion to use it.
7. The following general propositions are summarized from the opinion of Mr. Justice CAHILL:

   a—Since 1827 the forms of law required to be followed in this State to effectuate a statutory dedication of land to public use have remained substantially unchanged. Changes have been made in matters of detail, but from the first the statute

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has required a plat or map showing the land intended to be dedicated to be made and acknowledged by the proprietor, and recorded in the office of the register of deeds.

b—The effect of such a statutory dedication has been to vest the fee in the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public; citing *Wanzer v. Blanchard*, 3 Mich. 16; and it has therefore been held that nothing short of a strict compliance with the terms of the statute, as to the acknowledgment and recording of the plat, would constitute a *present* grant to the public; citing *People v. Beaubien*, 2 Doug. 270; *Burton v. Martz*, 88 Mich. 761.

c—The right to make common-law dedications is not abridged by the statutory regulations providing for dedications in certain specific ways; citing *People v. Beaubien*, 2 Doug. 270; *Baker v. Johnston*, 21 Mich. 319.

d—Making a plat of land by the proprietor, showing lots, blocks, and streets, evidently for the use of those who shall come to occupy the property, and their subsequent sale in such subdivisions, according to the plat, is one of the clearest ways of declaring an intention to dedicate, and has been held to conclude the owner, so far as the rights of subsequent purchasers are concerned; citing 5 Amer. & Eng. Enc. Law, tit. "Dedication," 405; but he is not concluded, as to the public, unless the dedication is accepted by the public; citing *People v. Jones*, 6 Mich. 176; *Tillman v. People*, 12 Id. 401; *Lee v. Lake*, 14 Id. 12; *Detroit v. Railroad Co.*, 23 Id. 173; and such acceptance must be within a reasonable time; citing *County of Wayne v. Miller*, 31 Mich. 447; *Field v. Village of Manchester*, 32 Id. 281; *Supervisors v. Banks*, 44 Id. 468.

Appeal from Kent. (Burch, J.) Argued October 21 and 22, 1890. Decided December 24, 1890.

Bill to remove an obstruction from a public street, etc. Defendants appeal. Decree granting the relief prayed for affirmed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for complainant, contended:

1. Complainant insists that both by user and by acceptance of the offered dedication of this street by the original platters, in which defendants' predecessor in title expressly acquiesced, the rights of the public therein are established.
2. Under Comp. Laws 1871, § 1268, all highways used for ten

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years or more, though not legally established, are deemed public highways; and, while the statute fixes the width of such roads at four rods, it does not follow that no road can be established by user of a less width, nor does a slight variation, and even for two or three rods, affect the right of the public to the street, when the owner has acquiesced in its claims for a sufficient length of time; citing *Bumpus v. Miller*, 4 Mich. 159; *Detroit v. Railroad Co.*, 23 Id. 173; *Pratt v. Lewis*, 39 Id. 7; *Nye v. Clark*, 55 Id. 600; and a general use of public country ways is all that is required; citing *Detroit v. Railroad Co.*, 23 Mich. 173; and when once established, and used as such for ten years, the highway can only be changed by statutory proceedings; citing *Pratt v. Lewis*, 39 Mich. 7; and although grown up to brush outside of the traveled track, if worked, surveyed, and fenced, it is properly treated as a highway; citing *Nye v. Clark*, 55 Mich. 600.

8. In establishing the character of a rarely traveled highway by user, evidence of an understanding in the community that the way was public is admissible, in connection with evidence of its use, as tending to negative any supposition that such use was by license or sufferance; citing *Wicks v. Ross*, 37 Mich. 464.

4. The ten-year statute has been held not applicable, unless some proceedings have been taken to lay out or establish a street; and it is immaterial that they are irregular; citing *Potter v. Safford*, 50 Mich. 46.

5. In *Scheimer v. Price*, 65 Mich. 638, it was held that a highway by user only included so much land as was used for that purpose, and that it could not be extended upon adjacent lands, against the consent of the owner, except under proper condemnation proceedings; and a highway may be lost by non-user; citing *Gregory v. Knight*, 50 Mich. 61; *Coleman v. Railroad Co.*, 64 Id. 160.

6. From the authorities cited it is clear that the claim of defendants that a portion of the street had been occupied, so that a street four rods in width was not in actual use, is immaterial, and if such were the fact it would be no bar to the retention of the portion used.

7. It is not claimed that the plat was executed under the statute, or that by its preparation and use in the sale of lots the dedication became complete, but that such acts were an *offer* to dedicate, which, if accepted before its withdrawal, perfected the right of the public to the street; citing *People v. Jones*, 6 Mich. 182; *Lee v. Lake*, 14 Id. 12; *Baker v. Johnston*, 21 Id. 320; *Detroit v. Railroad Co.*, 23 Id. 208; *White v. Smith*, 37 Id. 291; *Buskirk v. Strickland*, 47 Id. 389; and, while to

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avoid such withdrawal the acceptance must be within a reasonable time, yet as long as the original proprietor, or those claiming through him, take no steps to withdraw the offer, it must be considered as a continuing one; citing *White v. Smith*, 37 Mich. 291.

8. The acceptance may be by user only; citing *Baker v. Johnston*, 21 Mich. 320; and steps taken to improve the property before revocation of the offer is a sufficient acceptance, and a revocation after acceptance is unavailing; citing *Chapin v. State*, 24 Conn. 239; and the acts and declarations of a party after the dedication has become a plat cannot have the effect of revoking or annulling the dedication, but acts at the time of or before dedication or acceptance may be shown as bearing on the intent; citing *Marble v. Price*, 54 Mich. 466; *Match Co. v. Ontonagon*, 72 Id. 249

9. Both parties claiming from the plat, and the owners of the land at the time it was made, the regularity of its execution is not open to question; citing *Johnstone v. Scott*, 11 Mich. 232; *Quinnin v. Reimers*, 46 Id. 608; *Wiley v. Lovely*, Id. 88.

Godwin, Adsit & McKnight (*E. A. Maher*, of counsel), for defendants, contended:

1. After the discovery that Jannes and Stenje Hovingh were in possession of and claimed title to a portion of the land claimed in the bill as South street, and charged to be in the possession of the defendants, the bill should have been amended, and said parties brought in; citing *Walker v. Railway Co.*, 47 Mich. 338.

2. Where the only claim made by an incorporated town is by virtue of a *recorded* plat by which a strip of ground is dedicated, but there is no evidence that the person who caused the plat to be recorded had any title to the land, nor any evidence of such user by the public as to establish the street by prescription, the establishment of a public highway is not shown; citing *Edenville v. Railway Co.*, 77 Iowa, 69; and in this case the plat was neither acknowledged nor recorded, nor does it appear to have been made by the owner of the land, nor who the owner was.

3. Acknowledgment is the essential act of dedication, and without it the plat has no force of itself for any purpose; citing *People v. Beaubien*, 2 Doug. 256; *Burton v. Martz*, 38 Mich. 762; and an unrecorded plat is no offer of dedication; citing *Bell v. Todd*, 51 Mich. 21; *Parent v. Boswell*, 59 Id. 308; nor could there be a dedication except by the owner; citing *Detroit v. Railroad Co.*, 28 Mich. 173; and marking a space on a village

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plat as a street does not necessarily make it a public highway; citing *Buskirk v. Strickland*, 47 Mich. 389; *Graham v. Poor*, 50 Id. 153.

4. A public highway was never established over this land by user. If the public ever acquired an easement over the land, it was by user, which must have been to the public at large; citing *Tupper v. Huson*, 46 Wis. 646; and merely passing over a strip of land for any length of time is not alone sufficient to convert it into a public highway, but it must have been accepted as such by the public authorities; citing *Irving v. Ford*, 65 Mich. 241.

5. User, by the public, of land for the purpose of travel, will not alone establish a dedication; there must be an intent to dedicate, which must be shown by clear evidence; citing *People v. Jones*, 6 Mich. 176; *Cook v. Hillsdale*, 7 Id. 115; *Lee v. Lake*, 14 Id. 12; and user of this so-called "street," while a portion of a common, by travel over or across the common within and without the limits of the alleged street, wherever the ground was best adapted to it, was not sufficient to prove acceptance by the public authorities of a dedication, even though an intent to dedicate were shown; citing *Detroit v. Railroad Co.*, 23 Mich. 174; nor was it sufficient evidence of dedication on the part of Osterhouse that he had knowledge of the use of his uninclosed land by the public, or of any part thereof; citing *Stacey v. Miller*, 14 Mo. 478; *Harding v. Jasper*, 14 Cal. 648.

6. If it is found that there was any offer by a competent party to dedicate the land for a public highway at any time during the years from 1871 to 1876, there was a release or abandonment by the township authorities and the public of the same by non-user; citing *Cooper v. Detroit*, 42 Mich. 584.

7. An easement may be lost by abandonment, which may be shown by a non-use for even a short time, accompanied by acts of the public authorities indicating an intention to abandon the right; citing *Dana v. Valentine*, 5 Metc. 14; *Dyer v. Sanford*, 9 Id. 395; *Canny v. Andrews*, 123 Mass. 155; *Pope v. Devereux*, 5 Gray, 409; and from the time the stave company ceased to use the ground, in 1876, the township authorities did nothing to indicate that the public had any rights in it.

8. Non-user is *prima facie* evidence of an intention to abandon; citing *Jennison v. Walker*, 11 Gray, 425; *Farrar v. Cooper*, 34 Me. 400; *Pratt v. Sweetser*, 68 Id. 344; *White v. Crawford*, 10 Mass. 183; *Chandler v. Pond Co.*, 125 Id. 544; *Pillsbury v. Moore*, 44 Me. 154; *Wilder v. St. Paul*, 12 Minn. 208.

9. Highways may be wholly, and there is no reason for holding

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that they may not be partially, discontinued by non-user; citing *Gregory v. Knight*, 50 Mich. 64; *Coleman v. Railroad Co.*, 64 Id. 160; *Lyle v. Lesia*, Id. 16; and as it is clearly shown that there was never any grant of the land for a public highway, and if it was ever acquired for such purpose it must have been by user alone, in which case it could only be measured by such use, if the Court shall find that only a portion was used, the decree, covering more land than was so acquired, is erroneous, and should be set aside; citing *Wayne Co. v. Miller*, 31 Mich. 447; *Field v. Village of Manchester*, 32 Id. 279; *Pratt v. Lewis*, 39 Id. 7; *McKay v. Doty*, 63 Id. 581; *Coleman v. Railroad Co.*, 64 Id. 164.

CAHILL, J. The bill in this cause was filed to restrain the defendants from erecting a building in what is described in the bill as "South Street," in the village of Grandville, and to require the defendants to tear down and remove a building partially completed by them there. The defense is that the place where the building was being erected is not a public street, but property which the defendants had purchased and have a right to erect their building on.

The facts relied on by complainant to establish the existence of a street are that in 1837 the owners of the land where the village of Grandville is situated made a plat thereof into lots and blocks, and showing streets and alleys intended for public use, in accordance with which the village has since been built, and property conveyed from time to time. This map was neither acknowledged nor recorded as required by the statute of 1827, then in force. 2 Terr. Laws, 577. The original plat was of the E. ½ of the N. E. ¼ of section 18, in the township of Wyoming. The eastern addition to this plat was of the N. W. ¼ of the N. W. ¼ of section 17. It does not appear whether these plats were made at the same time, nor is it important, as the land in question is on the eastern addition, and it is conceded that that plat was made in 1837. South street, as indicated on these plats,

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commenced at the south-west corner of the N. E. ¼ of the N. E. ¼ of section 18, and ran from thence east on the eighth line to the south-east corner of the N. W. ¼ of the N. W. ¼ of section 17. At the time these plats were made, there were very few actual settlers at Grandville. The expectations of the proprietors of the plat, in regard to the growth of the village, were not realized. The village was not incorporated as a village until 1885, and has now a population of only about 600. Prior to 1871, no steps had ever been taken towards opening or improving South street.

In 1857 one Nicholas Osterhouse bought, and had conveyed to him, a piece of land described as block 12, eastern addition to the village of Grandville. Block 12, according to the plat before referred to, was bounded on the north by Ferry street, on the west by East street, on the south by South street, and on the east by Church street. At the time of Osterhouse's settlement there, none of these streets except East street were open or in use. He built his house fronting on East street near the south-west corner of the block, and south of that, and upon what on the plat was shown as South street, he built his barn. In this way he continued to occupy the premises until August, 1871, when he conveyed a strip of land 66 feet wide, through block 12, for the use of the Grand Rapids & Holland Railroad Company for a right of way. In October following he conveyed to the same railroad company—

"All that part of block 12 that lies south of the portion of said block heretofore deeded to said railroad company, * * * and bounded on the east by Church street, on the south by South street, and on the west by East street."

The land so deeded by him to the railroad company was that upon which his house was situated. Soon after, his house was removed, and the depot of the railroad com-

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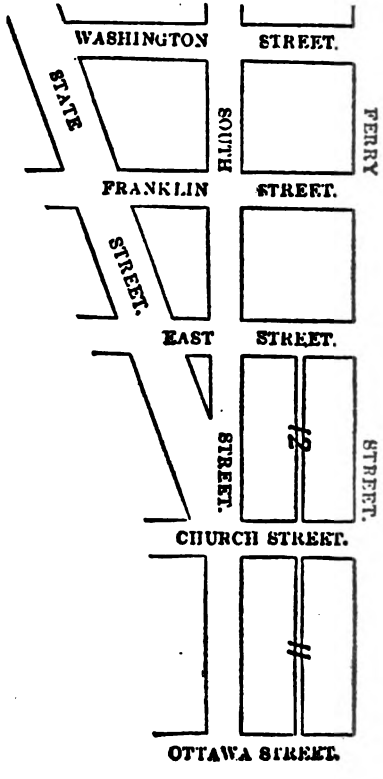
pany built not far from but slightly east of the same site. The barn was also removed from South street. During that same season a stave-mill was erected something over a block east of East street, and a little south of South street. There was no convenient means of access to this mill. On October 3, 1871, a petition was made to the highway commissioners of the township of Wyoming, by Mr. Knowles, at that time station agent of the railroad company, and seven others, who described themselves as freeholders of that township, requesting them—

"To open State street, in the village of Grandville, from East street east to Church street, and also to lay out and establish a public highway commencing at some point on Church street, south of the Grand Rapids & Holland Railroad land, running easterly, parallel to and adjoining the land of said railroad company, to Ottawa street."



It will be noticed by reference to the plat, a copy of which is appended, that State street is a diagonal street,

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running north-east, and crossing East street a short distance south-west of the point at which it would form a junction with South street.

It appears that a Mr. Keil, the owner of the land through which State street would run if opened, objected to the opening of that diagonal street, but offered, in case the commissioners would act upon it, to give sufficient land along his north line, east of East street, and lying immediately south of the eighth line, between East street and Church street, to make, as shown on the plat, a street of four rods in width from East street to Church street. Mr. Freeman, who was at that time one of the commissioners of highways, was examined as a witness for the complainant, and testified that the commissioners acted upon this offer, and proceeded to lay out a street four rods wide, commencing at East street and running due east to the stave-mill, then in operation. He testified that the street so laid out was immediately adjoining the land deeded by Osterhouse to the railroad company, as the south part of block 12. Through the center of this newly-laid street was a fence running east and west, supposed to be built on the eighth line. There was also a fence running from the south-west corner of the railroad ground, south. These fences were ordered to be, and were in fact, removed by Mr. Kell two rods south, so as to form the southerly line of the street, and that along East street was taken down. It appears that Mr. Knowles, representing the railroad company, and the owners of the stave-mill were the principal movers in this proceeding to open up a street, and that the street so opened corresponded with that shown upon the plat as South street. Mr. Freeman testified that he thought a record of the opening of this street was made, but no record appears in the town-clerk's office, and, as the petition under which he acted did not ask for the opening of the street which

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was in fact opened, it is not important that no further record was made of the action taken. It must be conceded that the commissioners were acting without jurisdiction in attempting to open South street upon a petition which asked for the opening of State street.

However irregular this action of the commissioners may have been, the parties immediately interested acquiesced in it; the street was opened and improved, and, during the following four or five years, was in constant use for travel by those who had business at the stave-mill or with the depot. There was also a family named Fleming, living near the stave-mill, who used this road in going to and from the business part of the village. During the year 1872 the overseer of highways expended some labor upon the street so laid out, but in 1873 declined to do so upon the ground that the labor was more needed in other localities. The proprietors of the stave-mill expended considerable labor in turnpiking and improving the street. In 1876 the stave-mill discontinued business, and the buildings formerly used as a stave and planing mill were only used in a small way as a cooper-shop. But public travel was not discontinued entirely over this street. The testimony shows that people continued to live in the Fleming house, and that the cooper-shop continued to be operated more or less, and that persons having occasion to visit either of these places were compelled to travel over this street, unless they trespassed upon the railroad or other private grounds. This situation continued until the last of August, 1889, when the defendants entered into possession of the north half of South street, fronting upon East street, and commenced the erection of a two-story frame building. They claimed the right to do so under a deed from Nicholas Miller, dated August 23, 1889, conveying to them—

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"The north half of South street, so called, on the south side of block 12, in the village of Grandville, Kent county, Michigan, being two rods front on East street according to the recorded plat thereof."

Miller claimed title from Nicholas Osterhouse under a deed dated July 16, 1889, conveying the same discription of land. On September 10, after the defendants commenced the erection of their building, action was taken by the village council to prevent the same. The village marshal was instructed to notify parties obstructing South street to remove obstructions immediately. On September 16 the following preamble and resolution were adopted:

"*Whereas*, the council of the village of Grandville have, by resolution, instructed the marshal of said village to remove obstructions from South street; and whereas, one Luman and Lucius Jenison have caused an obstruction to be placed in said street, and have refused and neglected to remove the same in accordance with the resolution of said council, after notice and request by said marshal: *Therefore resolved*, that J. W. Cooper, J. S. Graham, and Tzar Caldwell be, and they are hereby, appointed a committee to institute the necessary suit in the name of the corporation of the village of Grandville, to enforce the rights of the said village in said street, to establish its title thereto, and cause to be removed all obstructions therefrom. Motion to adopt made and carried."

In pursuance of that resolution this bill was filed. It appears that, in addition to the obstructions which the defendants had placed in this supposed street, a Mrs. Hovingh has erected a house and barn on the south side of and partially in the street, and that other persons occupying adjoining lands have erected chicken parks within the line of the street, and have occupied them for several years; also that people have piled wood and lumber, at various times, within the line of the street; but it does not appear that any of these encroachments

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have excluded the public from the use of the traveled part of the street.

One objection raised to this bill by the defendants is that it is defective for want of parties; that Mrs. Hovingh and the other parties obstructing the street should have been made parties. There is no force in this objection, as the rights of the various persons making encroachments upon the street are in no way connected with, or dependent on, each other, nor does it appear that any persons, excepting the defendants, have refused to remove their encroachments when requested.

Upon this state of facts we have to determine whether the land upon which defendants have erected their building is a public street. It is claimed that it is a street, first, by dedication. It is not claimed that there has been a dedication under the statute. Since 1827 the forms of law required to be followed in this State to effectuate a statutory dedication of land to public use have remained substantially the same. Changes have been made in matters of detail, but from the first the statute has required a plat or map showing the land intended to be dedicated to be made and acknowledged by the proprietor, and recorded in the office of the register of deeds. The effect of such statutory dedication, unlike a dedication at common law, has been to *vest the fee* of such parcels of land as are therein expressed, named, and intended to be for public use *in the county* in which the same shall be, for the uses and purposes intended. 2 Terr. Laws, 577 (How. Stat. chap. 32). The effect of a dedication under the statute has been to vest the fee in the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public. *Wanzer v. Blanchard*, 3 Mich. 16. It has therefore been held that nothing

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short of a strict compliance with the terms of the statute, as to the acknowledgment and recording of the plat, would constitute a present grant to the public. *People v. Beaubien*, 2 Doug. 270; *Burton v. Martz*, 38 Mich. 761; 2 Dill. Mun. Corp. § 491, and cases cited.

The right to make common-law dedications is not abridged by the statutory regulations providing for statutory regulations in certain specific ways. *People v. Beaubien, supra; Lee v. Lake*, 14 Mich. 12; *Baker v. Johnston*, 21 Id. 319; 2 Dill. Mun. Corp. § 493. The making of a plat of lands by the proprietor, showing lots, blocks, and streets, evidently for the use of those who shall come to occupy the property, and the subsequent sale of the property in lots or blocks, according to such plat, as was done in this case, is one of the clearest ways of declaring an intention to dedicate. Such an act has been held to conclude the owners, so far as the rights of subsequent purchasers are concerned. 5 Amer. & Eng. Enc. Law, tit. "Dedication," 405, and cases cited. But the owner is not concluded, as to the public, unless the dedication be accepted by the public. *People v. Jones*, 6 Mich. 176; *Lee v. Lake, supra; Tillman v. People*, 12 Mich. 401; *Detroit v. Railroad Co.*, 23 Id. 173. It was said in *Tillman v. People*, 12 Mich. 405, which was the case of a supposed street, that—

"It was essential, before such dedication could become effectual, that it should be accepted by the proper authorities on behalf of the public; that such acceptance should be manifested by some act of the public authorities, either formally confirming or accepting the dedication, and ordering the opening of such street, or by exercising authority over it in some of the ordinary ways of improvement or regulation."

The acceptance must be within a reasonable time. *County of Wayne v. Miller*, 31 Mich. 447; *Field v. Village*

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of Manchester, 32 Id. 281; *Cass Co. Sup'rs v. Banks*, 44 Id. 468.

In this case the offer of dedication was made in 1837. Nothing was done by the public to indicate an acceptance of the offer for 20 years, when Nicholas Osterhouse, who had become the owner of the adjoining property, and to which this easement was appurtenant, took possession of the land, built a barn upon that portion that had been offered to the public for a street, and continued to occupy the same for 14 years, in such a way as to indicate a clear intention not to recognize the right of the public in it. The rule declared in *Field v. Village of Manchester*, 32 Mich. 281, applies here, and it must be held that the public have no rights in this property by right of the dedication.

It remains to be considered whether any rights have been obtained by user since 1871. It is clear, as has been said, that the action of the commissioners in 1871 was not a lawful laying out of a road under the statute. It is equally clear that the commissioners laid out a road in fact, which the public adopted, and have used to the full extent that they had occasion to use it from that time until prevented by the defendants' encroachments. The evidence shows that, up to the time when travel was interrupted by the defendants, that portion of the street where their building stands was well worn with travel from teams going to and from the depot. The street further east was not so much used, but it was used when needed. The statute in force in 1871 (Comp. Laws 1871, § 1268), and in force substantially at the present time (How. Stat. § 1315), provides that—

"All public highways now in use and duly recorded, and all roads not recorded which have been used ten years or more, or which may hereafter be laid out and not recorded, and which shall have been used ten years or more, shall be deemed public highways, subject to be

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altered or discontinued according to the provisions of this act."

This statute applies to this case. *Ellsworth v. Grand Rapids*, 27 Mich. 249; *Potter v. Safford*, 50 Id. 46; *Nye v. Clark*, 55 Id. 600.

Evidence of the general understanding in the community that South street was a highway was properly admitted. It was competent also to show that the supervisor had refused to assess the land, although requested to do so, on the ground that it was a highway. *Wicks v. Ross*, 37 Mich. 464.

The encroachments upon this highway made at various times by the building of chicken parks, piling of lumber, wood, etc., which did not obstruct travel, did not necessarily show a non-user. The statute recognizes the fact that such things will occur, and provides a remedy. But the rights of the public will not be lost by anything short of an actual abandonment of the use by which they secured it.

The extent to which a road is traveled does not govern. The law does not fix the number who must travel upon a road in order to determine whether it exists by user. It must be used by the public, and the public are all who have occasion to use it. In the case of *Baldwin v. Herbst*, 54 Iowa, 168, it was held that it would be sufficient to constitute a highway by user if it was traveled over as much, or about as much, as it would have been if it was laid out by the statute, and traveled as much as the circumstances of the surrounding population, and their business, required.

The decree of the circuit court was in accordance with these views, and is affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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FRANK NORTH AND MARY E. JOHNSON v. JAMES M. VAN TASSEL, JUDGE OF PROBATE OF TUSCOLA COUNTY.

Estates of deceased persons—Claims—Will—Specific devise—Allowance for support of family.

1. **An order closing the hearing of claims against an estate, made within the year allowed for its settlement, and after the expiration of the time fixed for the presentation of claims, but without proof of notice to creditors to present their claims, will not operate to close the estate so as to prevent the making of an order for an allowance to the widow for the support of herself and the minor children during the progress of such settlement.**

2. **It is for the probate court to determine, upon proper showing, the allowance to be made for the support of the widow and minor children during the progress of the settlement of an estate which is specifically devised and bequeathed, and the proportion each part of the estate shall contribute to the payment of such allowance.**

Certiorari to review proceedings of respondent granting an order for an allowance for the maintenance of the widow and infant children of Townsend North, deceased. Argued October 28, 1890. Writ of *certiorari* quashed December 24, 1890. The facts are stated in the opinion.

Frank L. Fales, for petitioners.

T. W. Atwood and *T. C. Quinn*, for respondent.

Hanchett, Stark & Hanchett, for Celia G. North, contended:

1. **It is only upon filing proof that notice to creditors to present claims has been given, as provided in How. Stat. §§ 5889, 5890, that the right to present them is barred; citing How. Stat. §§ 5895, 5901, 5946; and upon this record creditors were not so barred; citing *Willard v. Van Leeuwen*, 56 Mich. 15; *Hart v. Circuit Judge*, Id. 592.**

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2. This Court will presume that the proofs presented to the probate court were sufficient to authorize the order for the widow's allowance, and the statements of the affidavit upon which the *certiorari* was allowed are not evidence at all; citing *Case v. Frey*, 24 Mich. 251; *Tomlin v. Fisher*, 27 Id. 524; *People v. Leavitt*, 41 Id. 470; *Matthews v. Supervisors*, 48 Id. 587; *Whitbeck v. Hudson*, 50 Id. 86.

3. The fact that the widow and minor children were legatees does not prevent such allowance; citing *Moore v. Moore*, 48 Mich. 271; and whoever takes under the will takes subject to the provisions for the widow and minor children, and to the order of the probate court apportioning the share of these expenses which ought to be paid by them; citing How. Stat. §§ 5816–5820; *Miller v. Stepper*, 32 Mich. 194, 201, 202.

LONG, J. This is a *certiorari* to review the proceedings of the judge of probate of Tuscola county in granting an order for maintenance to the widow and infant children of Townsend North, deceased. Townsend North departed this life in Tuscola county on June 12, 1889, leaving a last will and testament. He left surviving him his widow and three daughters, named Alma L., Ula, and Lena T. North, issue of that marriage, as well as two children by a former marriage. These last-named children are the plaintiffs in error in this writ.

The order complained of was made April 28, 1890, and, as stated in the order, was to be in full for all allowances to the widow for the support of herself and children, Alma L., Ula, and Lena T. North, during the progress of the settlement of the estate, and it provided that the real and personal estate given, devised, and bequeathed by said will be charged and be liable for the payment of said allowance in proportion to the amount of the several devises and legacies in said last will and testament. The order concludes as follows:

"It is further ordered and decreed that the said Frank North and Mary E. Johnson, devisees and legatees under said will, and all other devisees and legatees thereunder, contribute to and pay said allowance in proportion to the

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amount of their several devises and legacies, which proportion is hereby determined to be as follows, viz.: The said Frank North and Mary E. Johnson, jointly, one-third; and Alma L. North, Ula North, and Lena T. North, jointly, one-third; and the said Celia G. North, one-third.

"It is further ordered and decreed that the said Frank North and Mary E. Johnson pay to the said Celia G. North the said one-third of the said allowance, viz., three hundred and twelve dollars, within thirty days from the date hereof, and that, in default of such payment, the said Celia G. North have execution for the collection thereof."

The decree also provides for execution against the minor children for the collection of like amount.

It appears that the will was duly admitted to probate, and it makes disposition of all of the estate of the testator by three specific devises:

1. To the wife, all of the personal property except the bank-stock and other items provided for.
2. The bank-stock, being eighty shares of the First National Bank of Vassar, to Frank North and Mary E. Johnson.
3. Stock in the Vassar Woolen-mill Company, consisting of 334 paid-up shares, to the wife and three minor daughters.

The real estate is devised specifically and by descriptions as follows:

1. To the wife and her three daughters.
2. To Frank North and Mary E. Johnson.

The estate was valued and inventoried at the sum of $65,328.11.

On July 15, 1889, an order was made allowing one year to dispose of the estate and pay the debts, and six months to creditors to present their claims. Under an order made, creditors were required to present their claims to the probate court for allowance on or before January 15, 1890, and that claims would be heard on

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August 19, 1889, and January 15, 1890. On February 24, 1890, an order was made closing the hearing of claims. It is insisted, however, on the part of the defendant in the writ, that there is no proof of publication of notice to creditors to present their claims for allowance under the order, and that, upon the showing made, the creditors are not barred from presenting their claims; that in this condition, before the year had expired for closing the estate, the probate court had power to order such allowance for the expenses of the maintenance of the widow and three minor children during the progress of the settlement of the estate; and that abundant reason is set up in the petition for the allowance asked for.

Schedule 2 of the will makes the provisions for Frank North and Mary E. Johnson, and is as follows:

"I also desire and devise and intrust, on certain conditions hereinafter named, do *set apart* to my son Frank and daughter Mary E. (Mrs. Jas. Johnson) the following real estate and personal property, to wit: The farm in Fremont, being the south-west quarter, and the south one-half of the north-west quarter, of section twenty-two, in town eleven north, of range nine east; the west one-half of the north-east quarter of section twelve, in town eleven north, of range ten east; the south-west quarter of the south-east quarter of section thirty-five, in town twelve north, of range eight east; the north-east quarter of the south-west quarter of section twenty-nine, in town eleven north, of range eight east; also, all unsold or uncontracted-for village lots or lands in Vassar, and eighty shares of stock in the First National Bank of Vassar, Michigan. All the above-described property under Schedule No. 2 is given to my son Frank and daughter Mary E. (Mrs. Jas. Johnson).

"*First.* In trust to pay all just dues and demands existing against me at the time of my death.

"*Second.* To pay my grandson Newton E. North, my granddaughters Minnie A. and May A. North, one thousand dollars out of my real estate in Vassar, Juniata, or Dayton, not otherwise disposed of, each being entitled to one-third of the amount named, with the privilege of

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selecting and agreeing with the trustees as to the pieces and value, or wait for sale and payment of said lands.

"*Third.* After paying all debts and legacies as above provided, I desire to have the balance equally divided between my son Frank and daughter Mary E. (Mrs. Jas. Johnson).

"*Fourth.* And I further desire and direct that the trustees give bonds for the faithful performance of the trust confided in them, and on the execution of such bonds I desire and direct that the administrators do deliver and set over the property named in Schedule No. 2 to the said Frank and Mary E., for the use and purposes above stated."

It is contended on the part of the plaintiffs in error that the gift to Frank North and Mary E. Johnson is a specific devise and bequest, and not dependent on any order of distribution or allotment by the probate court; that it is severed from the remainder of the estate for the specific purpose that such devisees and legatees should pay all the debts of the estate existing at the time of the death of the testator, and to pay the legacy of $1,000.[1] It appears that these devisees and legatees gave the bond required by the terms of the will, and on January 15, 1890, the probate court made an order reciting the terms of the will under which Frank North and Mary E. Johnson were to take, and also that the bond had been given as provided by the will, and directing that the property so to be taken be so distributed to them, and that the executors make proper conveyances to them of the real estate so devised. It further appears that the probate court did hear claims, and disallowed claims to the amount of $498.17, and entered an order closing the hearing of claims on February 24, 1890. There is also a statement in the record of claims against the estate of Townsend North as paid by Frank North and Mary E.

[1] Counsel cite How. Stat. § 5816; *Proctor v. Robinson*, 35 Mich. 284; *Hays v. Jackson*, 6 Mass. 149; *Walton v. Walton*, 7 Johns. Ch. 258,—as supporting this contention.

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Johnson, amounting to the sum of $3.207.64. The only proof of the payment of these claims is an affidavit of Frank North attached to the list, and returned in the record. Just what proofs were offered in the probate court upon the hearing of the petition for allowance does not appear, as the case comes up on *certiorari*, and only brings up the record. But the record purports to be all the files in that court and orders made in relation to the estate.

It is quite apparent from the record that at the time the order was made the estate was not closed. The entry of the order by the probate court to that effect did not operate to close the estate. The statute provides for notice to be given to creditors of the time fixed for hearing claims before the order can properly be made closing the allowance of claims. How. Stat. §§ 5889, 5890, 5895. There is no proof, so far as shown by this record, that such notice was given. The matters of the estate were then in such condition that an order for allowance could properly be made under the provisions of How. Stat. § 5813, which authorizes the probate court to make such reasonable allowance as may be judged necessary by the court for the expenses of the widow and minor children, constituting the family of the testator, during the progress of the settlement of the estate; the only limitation being that it shall not be for a longer period than until their shares in the estate shall be assigned to them. The year for the settlement of the estate had not elapsed when the order was made.

It was for the probate court to inquire into the truth of the petition. The petition sets out sufficient facts, if true, to warrant the order, unless, as claimed by the plaintiffs in error, the devises and legacies to them were specific, and no allowance could be made out of specific devises and legacies. The devises and legacies to Frank

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North and Mary E. Johnson were no more specific under the terms of the will than were the devises and legacies to the widow and the minor children. It was the evident intent of the testator to set apart certain portions of the estate to each,—to the widow, one part; the minor children, three in number, one part; and to Frank North and Mary E. Johnson, one part. This included the whole of the estate. It is provided by How. Stat. § 5816, that—

"The estate, real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises and legacies, and the persons to whom they shall be made, may be exempted, if it shall appear to the court necessary in order to carry into effect the intention of the testator, if there shall be other sufficient estate."

In the present case the whole estate is specifically devised and bequeathed. It therefore became a matter for the probate court to determine, under the facts shown, when the petition for allowance was presented, just what allowance should be made, and the proportion each part of the estate should contribute to meet the amount necessary to provide for the widow and minor children during the settlement of the estate. We are not called upon to decide whether the probate court fixed the amount which the plaintiffs should pay at too small or too great a sum. The facts were before that court, and are not present here on this record. We find no error in the making of the order sought to be set aside by this proceeding.

The writ of *certiorari* must be quashed, with costs to the defendant in error.

The order of the probate court is affirmed.

The other Justices concurred.

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THE WESTERN WOODEN-WARE ASSOCIATION (A CORPORATION) v. WILLIAM W. STARKEY ET AL.

Contract—Restraint of trade—Public policy.

A Michigan manufacturing firm sold their stock and material to an Illinois corporation engaged in a similar business in that state, and agreed not to engage in the business for five years in eight specified states, including those in which the parties resided, nor to allow the premises where they had been carrying on their business to be used for that purpose, nor to sell them for such use, without the consent of the corporation; which agreement is held void on the ground of public policy.[1]

Appeal from Gratiot. (Daboll, J.) Argued October 28, 1890. Decided December 24, 1890.

Bill to enjoin defendants from engaging in a manufacturing business, etc. Complainant appeals from decree dismissing bill. Affirmed. The facts are stated in the opinion.

Hatch & Cooley, for complainant.

T. W. Whitney, for defendants.

LONG, J. The bill in this cause is filed for the purpose of having the defendants Starkey, Ferris, and Olmsted enjoined from engaging in the business of manufacturing pails, tubs, and other articles of wooden-ware during the period of five years from June 29, A. D. 1888; to enjoin the other defendants from carrying on that business with them; and to enjoin all the defendants from using certain premises in the village of St. Louis, Gratiot county, for the purpose of manufacturing tubs, pails, etc. The bill

[1] See *Thompson v. Andrus*, 73 Mich. 551, for a case on this subject.

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asks for an accounting touching complainant's damages, for a decree requiring the same to be paid, and there is also a prayer for general relief.

The bill shows that the complainant is a corporation organized under the laws of the state of Illinois for the purpose of carrying on the business of manufacturing, buying, and selling wooden-ware, and the materials which enter into wooden-ware; that it was engaged in the business prior to June 29, 1888; that on that date the defendants Starkey, Ferris, and Olmsted were doing business at St. Louis as partners under the name of the St. Louis Wooden-ware Company; that they were engaged in business similar to that of complainant, and owned and occupied certain premises, with a manufacturing establishment, and were possessed of a large quantity of manufactured articles, materials, tools, and other chattels used in their business; that on that date the complainant and the members of said copartnership entered into a contract, which is attached to the bill, the material parts of which will be referred to. By this contract, the firm, in consideration of $6,000, agreed to sell to the complainant their stock on hand, materials, tools, implements, and chattels. The contract contains this clause:

"And said first parties also agree not to become engaged in the manufacture of tubs and pails during the next five years in the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana, or Ohio, or allow their property at St. Louis, Mich., to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages for violating this contract."

The contract also contains certain other provisions not necessary here to be noticed. After making the contract the complainant paid the copartnership the $6,000, and

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received the chattels. The defendants Starkey, Ferris, and Olmsted violated the contract, in that they are now engaged in manufacturing and selling wooden-ware in the premises in question, and, as the bill alleges, have confederated with the other defendants, Palmerton, Fowler, and Newman, to carry on the business with them, and, for the purpose of concealing their transactions, procured the defendants Palmerton, Fowler, and Newman to organize a corporation under the name of the F. G. Palmerton Wooden-ware Company, Limited, with intent to engage in said business.

The bill further charges that the defendant Starkey pretended to convey the lands in question to his son-in-law, Palmerton; that Palmerton has conveyed them to the Palmerton Wooden-ware Company, and that the business of manufacturing wooden-ware has been carried on on said premises by the Palmerton Wooden-ware Company; that the defendants Starkey and Ferris have active supervision, control, and management of said corporation, and have been making sales of their pails and tubs in all the states of Michigan, Minnesota, Wisconsin, Illinois, Iowa, Missouri, Indiana, and Ohio. The bill charges that the corporation so organized by the defendants is a mere pretense and cover procured to be organized by the defendants Starkey and Ferris; that Starkey and Ferris furnish the capital therefor; that the stock of the corporation is held for their benefit and advantage; that the breach of the contract on the part of the defendants has greatly injured and damnified the complainant.

To this bill the defendants filed a general demurrer, which the circuit judge sustained, and on March 14, 1890, entered a decree dismissing the bill. From this decree complainant appeals.

Complainant's counsel raised but three questions in this Court:

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1. That the clause of the contract wherein the defendants Starkey, Ferris, and Olmsted agree not to become engaged in the manufacture of tubs, etc., during the next five years, in any of the eight states named, or permit the premises in question to be used for that purpose without the consent of the complainant, is valid.

2. That the clause of the contract which provides, "in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages for violating this contract," does not preclude the complainant seeking relief by injunction.[1]

3. That Act No. 225, Laws of 1889 (3 How. Stat. §§ 9354*j*—9354*p*), declaring certain contracts, agreements, undertakings, and combinations unlawful, and providing punishment for those who shall enter into the same, or do any act in the furtherance thereof, has no application in this case.[2]

Counsel for complainant contend, under their first proposition, that this covenant is limited in respect to time; that it is also limited in regard to territory,—that is, to Michigan and the seven other states named; that it is a covenant embodied in the contract, by which contract the defendants Starkey, Ferris, and Olmsted sell certain property, the price being fixed at one sum both for the value of the property and for the covenant; that how much of this price is applicable to the property sold, and how much to the covenant not to engage in business, neither the contract nor the circumstances enable us to say; but that it would be presumed that, by reason of the covenant, a larger price was paid by the complainant than would be necessary merely to

[1] Counsel cited 2 High, Inj. § 1139; *Hardy v. Martin*, 1 Cox, 26; *Barret v. Blagrave*, 5 Ves. 555; *Watrous v. Allen*, 57 Mich. 362, 368; *Insurance Co. v. Insurance Co.*, 87 N. Y. 400; *Match Co. v. Roeber*, 106 Id. 473; *Fox v. Scard*, 33 Beav. 327.

[2] Counsel cited Const. U. S. Art. 1, § 10; *Whitely v. Lansing*, 27 Mich. 131; *Waldron v. Harring*, 28 Id. 493,—on the proposition that a law impairing the obligation of contracts cannot be passed, and *Mundy v. Monroe*, 1 Mich. 68; *Blackwood v. Van Vleet*, 11 Id. 252; *Bank v. Warren*, 52 Id. 557,—that denial of a remedy is unconstitutional.

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cover the value of the property sold. Counsel insist that this question has been settled decisively by this Court, and, in support of that proposition, cite *Hubbard v Miller*, 27 Mich. 15; *Beal v. Chase*, 31 Id. 490. Counsel also contend that the rule laid down in *Beal v. Chase, supra*, is approved in *Doty v. Martin*, 32 Mich. 462; *Caswell v. Gibbs*, 33 Id. 331; *Grow v. Seligman*, 47 Id. 610; *Watrous v. Allen*, 57 Id. 366.

From the view we take of this case, we need discuss but one question. The contract must be declared void on the ground of public policy. The cases cited by counsel for complainant do not sustain the doctrine they contend for here. This case does not fall within that class of cases where contracts have been upheld though the parties, by the contract, were to abstain from carrying on the same business for a particular length of time, and within a designated territory. In *Hubbard v. Miller*, 27 Mich. 15, the complainant was engaged in carrying on the business of a general retail hardware store in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking drive-wells, and was also carrying on the business of putting down drive-wells. Two of the defendants, Miller and Decker, partners under the firm name of George W. Miller & Co., kept a like hardware store in the same city, and, like the complainant, kept on hand the tubing and other materials used in putting down such wells, and were also engaged in putting them down for those who chose to employ them. Complainant purchased the stock, tools, etc., of the defendants Miller and Decker, and paid their price, on condition that they would cease to do that kind of business, and would not keep well-drivers' tools and fixtures. The defendants violated this contract. The firm of George W. Miller & Co. was dissolved, and afterwards reorganized, with the defendant Akeley as a mem-

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ber of the firm. The new firm shortly after went into business, and kept the same kind of tools and materials as complainant, and carried on the well-driving business. Defendant Decker went into business for himself, and also carried the same line of stock, and commenced putting down drive-wells. It is true that this Court, on the hearing here, granted a perpetual injunction. But Chief Justice CHRISTIANCY, who wrote the opinion in the case, said:

"Whether it [the contract] can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration. It will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public; in short, all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be effected by any presumption for or against the validity of the restriction. If reasonable and just, the restriction will be sustained; if not, it will be held void."

The Court construed this contract as limited to the city of Grand Haven and vicinity. It will be noticed that the circumstances surrounding that case and the situation of the parties show that the complainant purchased a business which was similar to the one which he was then carrying on, and which he continued to carry on thereafter in the same place. The public may have been as well served by this means as though the two or three firms continued the business.

In *Beal v. Chase*, 31 Mich. 490, to which the learned counsel refer as sustaining their position, it appears that Chase was the publisher of a receipt-book, and carried on the business of printing. Chase sold to Beal his printing establishment, the receipt-book and copyrights, the good-will of the business, and the right to use the name of Dr. Chase in connection with the book and business, and

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agreed not to engage in the business of printing and publishing in the State of Michigan so long as Beal remained in the printing and publishing business at Ann Arbor. The whole business was turned over to Beal, and he was to fulfill all contracts entered into by Dr. Chase, and was to furnish the paper, the "Courier and Visitant," to all subscribers, etc. It appears that the business was to be carried on as Chase had carried it on, and the property purchased was devoted to the business in which it had theretofore been used; it was not, like the present case, closed up and taken out of the channels of business; and the Court upheld and enforced the contract which the parties themselves had made.

The complainant here is a corporation organized and existing under the laws of the state of Illinois, and having its place of business in Chicago. It is alleged in the bill that it is organized for the business of manufacturing, buying, and selling pails, tubs, and other articles of wooden-ware, and manufacturing, buying, and selling staves, heading, hoops, and other materials which enter into their manufacture, and also for the owning and operating machinery, tools, and implements connected with and used in the manufacture of pails, tubs, and other articles of wooden-ware; that it is extensively engaged in such business; and that it sells its products in the eight great states named. It is not alleged by the bill that, in the making of the contract, the complainant intended to take the business and good-will of Starkey, Ferris, and Olmsted, and carry on the business of manufacturing these articles in this State, but, from the terms of the contract, it is manifest that it not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the State, and close the

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doors of the shops. Complainant did not purchase the realty. It purchased all the machinery there in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considerations involved here. It is the duty of the Court to see that the public interests are not in any manner jeopardized. The State has the welfare of all its citizens in keeping, and the public interest is the pole-star to all judicial inquiries.

Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the State. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great north-west, teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris, and Olmsted, and shut the doors of that shop, and prohibit their again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the State, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of $2,000.

A somewhat similar question arose in *Wright v. Ryder*,

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reported in 36 Cal. 342. There a contract had been entered into for the purchase by the Oregon Steam Navigation Company of the California Steam Navigation Company of a steam-boat called the "New World," for the sum of $75,000, and also an agreement by the Oregon Steam Navigation Company that the steam-boat should not be run upon any of the routes of travel on the rivers, bays, or waters of the state of California, for the period of 10 years thereafter. The validity of this contract was before the court, it being claimed that it was void on the ground of public policy, and it was held void, the court there saying:

"If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steam-boats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this state for a period of 10 years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of 50 tons burden should be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this state for a period of 10 years, it might produce great public inconvenience; whereas, if only one carpenter or mason should enter into a similar contract, the loss of his services might not be felt by the public. And yet, in the latter case, we would be bound by a long line of adjudications in England and America to hold the contract void as in restraint of trade."

In the present case, the defendants Starkey, Ferris, and Olmsted were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the

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citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void as unreasonable restraints of trade, and therefore void on the ground of public policy.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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WILLIAM J. MAJOR v. ALBERT M. TODD.

Partnership—Dissolution—Accounting—Compensation for services.

1. Where the term of a partnership is for an indefinite period, it may be dissolved at the will of either party; citing *Buck v. Smith*, 29 Mich. 166; *Solomon v. Kirkwood*, 55 Id. 256; *Walker v. Whipple*, 58 Id. 476.
2. Where one partner holds exclusive possession of the partnership property, and wrongfully refuses to let in the other partner, he will be accountable in a court of equity to such partner for his share of the profits made, which accounting will cover the time during which the partnership assets are used in making them.
3. In the absence of an express stipulation to that effect, a partner is not entitled to compensation for his services in and about the partnership business. *Heath v. Waters*, 40 Mich. 457; *Loomis v. Armstrong*, 49 Id. 525.

Appeal from St. Joseph. (Loveridge, J.) Argued October 30 and 31, 1890. Decided December 24, 1890.

Bill to dissolve partnership and for an accounting. Defendant appeals from a decree granting the relief prayed. Decree affirmed. The facts are stated in the opinion.

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Stewart & Meacham and *Dallas Boudeman*, for complainant.

Howard & Roos, for defendant.

LONG, J. Complainant files his bill for the dissolution of a partnership and for an accounting. Decree was entered in the court below in favor of complainant as prayed in the bill. In the decree, the court made certain findings of fact, which are controverted here, and, as these findings relate to the principal questions raised in this Court, we insert the substance of such findings. It was found—

"1. That the said complainant and defendant are copartners in the carrying on of the business of harvesting, storing, and selling ice at Nottawa, St. Joseph Co., Mich., and have been copartners since on or about the 13th day of December, A. D. 1883.

"2. That, as copartners, the said parties on or about the 13th day of December, 1883, became and were the owners of that certain property, premises, and business described as follows: [Here describing the real estate;] also the railroad side track adjacent to said lands; also certain large ice-houses situated thereon, together with a large quanity of ice therein, and together with a quantity of tools, machinery, and lumber belonging to the ice business; and also a street called 'Railroad Street,' situated between Wallace and South streets, and that part of Williams street lying west of Nottawa street,—all lying and being in the village of Nottawa, St. Joseph county, Mich., and also were joint owners, as copartners, in the business of gathering, storing, and marketing ice on said premises and at Nottawa at and since the time last above mentioned.

"3. That the purported deed of conveyance, alleged to have been made by the complainant and wife to defendant, of the date of the 3d of January, A. D. 1889, and recorded in the office of the register of deeds for said St. Joseph county in Liber 86 of Deeds, page 68, purporting to be a quitclaim of the complainant's right, title, and interest in the property and business above mentioned, was never delivered to the defendant." This deed is

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declared to be void and of no effect, and is set aside, and the title to the property purported to be conveyed thereunder decreed to stand in the complainant as if no such deed had ever been made and placed on record.

"4. That said copartnership existing between the parties to this suit has never been dissolved, but that defendant, since about the 3d day of January, 1889, has excluded complainant from the business of said copartnership, and has operated said copartnership in his own name, receiving all the profits thereof, and that there never has been any accounting between the said copartners as to said copartnership business."

The decree orders an account to be taken before a circuit court commissioner of St. Joseph county, and a report made thereon to the court. This accounting is to commence with the beginning of the partnership on December 13, 1883, and extend up to the close of the examination before the commissioner, including the years 1889 and 1890.

The claim by the defendant on the hearing in the court below was, and that claim is made here,—

1. That there never was any partnership between the parties.

2. That, if there was, it was wound up by the deed of January 3, 1889, which defendant insists was delivered, and operated to wind up the partnership affairs, and that at the time of such dissolution all the affairs of the partnership were settled, and therefore no accounting can be decreed.

3. That, if any partnership ever existed, it was an indefinite and uncertain one, and for an indefinite time, and that either partner could dissolve it at will; that defendant did dissolve the same on January 2, 1889, and, if any accounting can be had, it can only be up to January 2, 1889.

The claim made by the bill is that on December 13, 1883, the defendant was the owner of the property hereinbefore mentioned, and was then engaged in the gathering, storing, and shipping of ice; that defendant then proposed to sell to complainant a half interest in said

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business, and represented that he had made considerable money out of the business, and, if complainant would purchase one-half interest therein, large profits would be made; that, believing the representations so made, complainant purchased the one-half interest, paying the sum of $9,000 therefor, and received from the defendant a transfer of an undivided half interest in the business and property; that immediately after such transfer the parties entered into a copartnership for the purpose of carrying on the business, each to have one-half of the profits, and to be liable for one-half of the losses; that the defendant was to have the personal management of the business; that it commenced on December 13, 1883, and continued under the firm name of the Crystal Lake Ice Company, and that such copartnership has never been dissolved, and no settlement ever had; that defendant has continued to manage the business according to the arrangement made between the parties, sold large quantities of ice, and received large sums of money; that he has failed to render any account of profits or losses to the complainant, although often requested to do so, and that he has applied to his own use the funds of the partnership.

It is also alleged that about January 1, 1889, negotiations were entered into between the parties for a sale by the complainant to the defendant of complainant's interest in said business and property, and in contemplation that the negotiations would be carried forward, and for the purpose of being ready to close up the same, complainant had drawn up, signed, and acknowledged by himself and wife a quitclaim deed from himself and wife to defendant of all their interest in said property, with the expectation that the parties would meet and adjust the copartnership matters, but that the said sale was never completed, and no transfer ever made, but, while the said negotiations were going on, the defendant fraud-

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ulently obtained possession of said deed, and caused the same to be recorded; that, after defendant had surreptitiously taken the deed and recorded the same, he executed to the National Bank of Sturgis a mortgage on said copartnership property for the sum of $6,000, which mortgage was recorded in the office of the register of deeds of St. Joseph county, and constitutes a cloud upon the title of the complainant to the property; that complainant is now desirous of dissolving the partnership, and he prays for an accounting. The bill also prays that the defendant be required to remove the mortgage to the National Bank of Sturgis, and that the deed from complainant to defendant be set aside, and that a receiver be appointed.

Defendant, by his answer, claims that on the sale of the property to the complainant the agreed price was $9,250, the payments being made by three notes of $2,000 each, and one of $1,922.50, said last note being the balance of such purchase price, less the amount due the complainant as principal and interest on a certain note for $1,200 which he then held against defendant; that he took charge of the business, and managed it, without any definite arrangement as to the amount of compensation he should receive, which he alleges was worth several hundred dollars per year; that, owing to unfavorable seasons, the business was not profitable; and that the receipts from the business were not equal to the cash disbursements made by the defendant. It is claimed by the answer that the notes so given by the complainant were not paid; that he had discounted the most of them at the bank, and had renewed them at complainant's request, from year to year, taking other notes from complainant for interest, when, on December 14, 1888, complainant again came to him, and asked for still another extension, which defendant refused, the indebtedness

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then amounting to $11,000, principal and interest; that complainant then gave to defendant a detailed statement of his resources and liabilities, as an inducement to have defendant again indorse for him, and from which statement it appeared that complainant was worth the sum of $25,000 over and above all liabilities; that defendant thereupon, at the request of the complainant, paid for him at the bank $1,403.67, taking his note therefor, but declined to indorse or sign with him in renewal of his indebtedness to said bank for the $6,000 principal yet unpaid of said original indebtedness; that upon maturity thereof complainant was notified by the bank to pay the same, but he neglected so to do, and instead thereof shifted and transferred his property and assets for the purpose of placing them beyond the reach of execution; that on January 7, 1889, the bank brought suit on the notes for $6,000 against complainant and defendant, and, on April 9 following, obtained judgment against them thereon, amounting to $6,554.16 and costs of suit, upon which judgment execution afterwards issued, and was levied upon a large amount of defendant's property, and also a portion of that which complainant is alleged to have fraudulently transferred; that, in order to save his property so levied upon from sale on execution, defendant was obliged to, and did, pay from his own individual funds the amount of said judgment and costs, and now has pending in the circuit court of said county in chancery a creditors' bill against said complainant and others, to whom he is alleged to have fraudulently conveyed his assets, to discover property out of which to pay defendant the moneys so paid by him on said judgment.

Defendant further shows by his answer that, while complainant originally agreed to pay $9,250 for the one-half of said property, he has not yet paid sufficient even to reimburse defendant for the actual cash defendant has

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paid for accumulated interest, and complainant is at the present time indebted to defendant in an amount greater than that of the original purchase price of said property. Defendant further says that, said complainant having failed to do as he originally agreed, and defendant desiring no longer to continue in business relations with him, on January 2, 1889, he offered to complainant his choice of two propositions,—either that defendant would sell to complainant defendant's one-half interest in said property and business for $1,500 cash, or that defendant would give complainant $2,000 for his interest therein, or, if complainant declined so to do, either defendant would lease this interest or accept a mortgage as security on the property. On the next day thereafter, complainant stated that he would accept defendant's proposition to sell his said interest at $2,000, and for that amount would convey the interest to defendant; and thereupon complainant and defendant agreed upon the terms of said sale, and complainant executed and delivered to defendant a good, sufficient, and valid conveyance of all complainant's interest in said business and the property, and defendant paid the agreed price of $2,000, and thereupon the *partnership* between complainant and defendant was dissolved, and their partnership relations wholly ceased, and since which time complainant has had no interest in said business or property. Defendant denies that he took said deed surreptitiously from the complainant, as alleged in the bill, or that any fraud was practiced in procuring it. Defendant also denies that he used any of said funds in his private business, and says that, with regard to placing the mortgage upon the property to the bank, it was only because of the injury to his business by the failure of the complainant to pay his indebtedness that he was obliged to place an incumbrance upon his property.

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Defendant further alleges that, after purchase of complainant's half interest, he went to work repairing the machinery and buildings at large expense, and expended large sums of money in filling the buildings with ice, and that all the business was done in his individual name, help was advertised for in his name, and, though he was so engaged for a long time in filling the ice-houses and making repairs, complainant never appeared, nor made any objections, and gave no directions, and took no interest therein, nor did he offer to furnish any funds, or to be in any way responsible for the same; that the season of 1888 and 1889 happened to be a good year for those engaged in the ice business, and it was only after defendant had succeeded in gathering a crop that it occurred to complainant to claim a half interest in the business, and a repudiation of the sale of his interest to defendant.

The testimony in the case was taken in open court. Even if the testimony failed to contradict and disprove defendant's first claim, the answer put in by him would be sufficient. That there was a partnership between the parties is conclusively shown. It is admitted in very plain and unequivocal terms by the answer, in which it is alleged—

"That thereupon the partnership between complainant and defendant was dissolved, and their partnership relations wholly ceased, and since which time complainant has had no interest in said property or business."

Aside from this admission in the answer,—which would of itself, under the allegations in the bill, be sufficient for the court to find the existence of a partnership,—we are satisfied that the court below was right in finding from the testimony that the partnership commenced between the parties on or about December 13, 1883. This partnership has never been dissolved by any act of the

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parties, unless the deed was made and delivered as claimed by defendant, and operated as a dissolution of the partnership relations. No accounting was ever had, and no such claim is made by the proofs. The deed purports to convey all the interest of the complainant to Mr. Todd in the property and business, and, if delivered as claimed, would undoubtedly have wound up the partnership affairs, and under Mr. Todd's testimony would have amounted to a full and final settlement of their partnership business.

Was the deed delivered as claimed by defendant? The complainant contends that it was not. He alleges that it was not, in his bill, and gave testimony on the trial to support that allegation. The defendant answers that the deed was voluntarily delivered, and he testifies upon the hearing in support of statements in his answer. The burden is upon the complainant to substantiate the truth of his statement. The deed is in defendant's possession, and has been placed upon record, and *prima facie* was voluntarily delivered to him. Mr. Todd testifies that he made a proposition to Mr. Major on January 2, 1889, to take $1,500 for his interest in the property and business, or to give $2,000 to Mr. Major; that Major accepted the last proposition, and agreed to take up his note of $1,400 which Todd held, and the balance to be adjusted when they adjusted other matters, and whatever might be then coming Todd was to pay. On the next day the parties met in the law office of Stewart & Meacham. The deed was there, but not signed by Mrs. Major. Mr. Todd insisted that Mrs. Major should sign the deed, when Mr. Stewart directed Meacham to go out and have Mrs. Major execute it, which was done. Mr. Todd then testifies as follows:

"I looked at it to see that it was all right, placed it in my pocket, and sat there for a few minutes talking

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about the adjustment of the accounts and other matters on the final settlement of the balance of the $2,000. I said: 'Mr. Major, jump into your buggy, and go down and look over the books, and close up the matters, as you agreed to.' Mr. Stewart said: 'Why can't you bring your books and settle the whole matter here?' I said: 'This is not the place to settle it. If you wish to come to my office with Mr. Major, come.' I said to Mr. Major: 'Won't you come down after dinner?' He said: 'No; I can't.' Mr. Stewart said: 'You had better give me back the deed until you and Major get your matters settled.' I said: 'Not by any means. Mr. Stewart, you know as well as I do the critical condition of matters. Everything with the exception of this ice property has been mortgaged and levied upon. You are well aware that on that account I am extremely anxious to put this matter in shape as soon as I can.' I said: 'I am going to record that deed."

Defendant further testified that he gave the $1,400 note over to Stewart, and that he put it in his pocket, and he has never seen it since. Defendant went immediately and recorded the deed. There were only four parties in the office at that time, Mr. Stewart, Mr. Meacham, and the parties to the controversy. Mr. Stewart was called as a witness by complainant; and his attention being directed to the deed, and whether it was delivered, he stated, substantially:

"As I recollect it, Mr. Major agreed that he would sell his interest in that property and business for $2,000. Mr. Todd said that this note [the $1,400 signed by Major] was in Wolf's Bank; that he would get the note; that there was a little difference between them on their accounts in the ice business, which would not exceed $150,—the half, of course, would be for Mr. Major to pay,—and the balance in cash would be between five and six hundred dollars, which he would pay. Mr. Major said he would sell on those terms. * * * Mr. Meacham went over, and got Mrs. Major to sign and acknowledge the deed. Mr. Meacham and Mr. Major came in. Mr. Todd was there. Mr. Meacham laid the deed on the table in front of me. Mr. Todd was standing by

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the side of the table. He reached his hand in his pocket, took the note out and threw it on the table, and took up the deed. I said: 'Hold on, Mr. Todd; that deed has not been delivered.' He said: 'That is all right; that is all right.' I said: 'No, it isn't all right.' He went to the stairs, and went part way down. I told him to come back, and I guess Mr. Major did too, but I don't recollect what Mr. Major did. I told him to come back, that he had stolen the deed from my table, and that I didn't allow people to steal deeds from me. He said it was all right, and I said it wasn't, and he came back into the office, and I said: 'Here, Mr. Todd, is that note you put on the table, and I want you to take that and deliver back that deed. You haven't paid the consideration, and I want you to understand that if you record that deed it is Major's deed.' As he started out, I said: 'Mr. Todd, I want you to understand that this entire trade is now off, and the whole thing is at an end, and you can't have the property.' He took the deed with him, but it was never delivered to him. I offered the note back to him, and told him to give back the deed which he had taken from the table; and then in his presence I told Mr. Meacham to take the note, and hold it for Mr. Todd. The note has never been in Mr. Major's possession. It is held by Mr. Meacham for Mr. Todd."

Mr. Meacham was called as a witness for the complainant, and corroborates the testimony of Mr. Stewart as to what took place in the office. This is also corroborated by the complainant, each testifying that the deed was not delivered, and Mr. Todd was told that he must not take the deed away. It is contended by counsel for defendant that this testimony and the surrounding circumstances show a delivery of the deed. We are not able to view it in that light. It is very doubtful indeed if the testimony of the defendant, when connected with the attendant circumstances, makes out the delivery as claimed. The argument is that, inasmuch as no steps were taken for a period of five months thereafter to set the deed aside, and in the mean time the defendant had gone on with the business himself, and made good profits,

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complainant ought not now to be permitted to share in the profits thus made. It is also said that the complainant now seeks to take advantage of the situation, and be placed in a position to share in profits thus made, but that, if the defendant had thereafter sustained losses, no such claim would have been made. While, as we have already said, the burden is upon the complainant to show that the deed was not voluntarily delivered, and that the defendant took it away surreptitiously, we are satisfied that the complainant has shown that the deed was not voluntarily delivered, not only by the testimony of these three witnesses, but the circumstances and the defendant's own testimony point strongly to the conclusion that the defendant at the time of taking the deed away was aware that it was not surrendered to him by Major with intent to have it take effect as a conveyance of all Major's interest in the property and business. The court below was therefore right in finding that there was no delivery of the deed, and consequently the partnership was not thus wound up.

It is contended, however, by the learned counsel for the defendant that, though the deed was not delivered so as to operate as a conveyance of the complainant's interest in the property and business, yet their partnership, if one ever existed, was for an indefinite period, and that a partnership indefinite as to time can be terminated at the will of either partner. It is not claimed by the bill, and there is no testimony contained in the record showing, that the partnership between the parties was to continue for any definite time. Counsel are right in the proposition that such a partnership may be dissolved at the will of either party. That question has been settled in this State. *Buck v. Smith,* 29 Mich. 166; *Solomon v. Kirkwood,* 55 Id. 256; *Walker v. Whipple,* 58 Id. 476. After the deed was recorded, the defendant

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carried on the business in his own name, and excluded the complainant from all control over it, or having any voice in its management. He advertised for men and teams to work, in his individual name, and refused to recognize the complainant's rights therein. By this means the partnership was dissolved. This fact, however, did not make him the sole owner of the property. He expended large sums of money, and it is not claimed but that he made large profits during the following winter. In doing this, he used all the available means of the partnership; its realty, as well as the tools and machinery. He had also taken to himself the good-will of the business, and to the utter exclusion of the complainant. It was out of these things, and the moneys advanced by him, that the profits were made.

It is contended by defendant's counsel that after the complainant was excluded from the business, which act worked a dissolution, the defendant could not be compelled to account for profits. The argument is that Major furnished nothing, and took no risks, and would not have been liable for one-half of the losses, if there had been any; that, therefore, all that the complainant can claim on an accounting is the fair rental value of the one-half interest in partnership assets which were used by Todd in making the profits. Counsel for defendant conclude their argument by remarking that, if the deed was delivered, that ends the case. If it was not delivered, the complainant is entitled to an accounting as partner only to January 2, 1889, and as a tenant in common of the property since; that is, for reasonable rent, less repairs. The decree provides for an accounting after January 2, 1889, as well as before; and in this it is contended the court below was in error. Counsel refer us to Lindl. Partn. (2 Amer. ed.) 467, where it is said that the doctrine of

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laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward, and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss, instead of gain; and the court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

But that is not this case. It appears that the defendant not only surreptitiously took the deed away, and claimed to own the whole of the business and property, but that, when the work was being commenced and being carried on, Mr. Major called upon the defendant, and proffered assistance, and was told by defendant that he would not talk with him about it. Complainant, if his testimony is true, called upon the defendant three times, and his rights were each time denied. He testifies that he had teams idle at the time, and would have put them to work in the business. This is not the case of one remaining idle, leaving the other to do all the work, and then coming forward to claim a share of the profits. He was insisting that he was a partner, and claiming his rights as such; and I know of no rule of law or equity which should preclude him from having an accounting for profits after January 2, 1889, as well as prior thereto. Of course, whatever moneys the defendant has put into the business to carry it forward must be taken into the account, as well as the indebtedness of the complainant to him which grew out of the purchase of the property in the partnership venture, as the complainant must also do equity. It is well settled that where one partner

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holds exclusive possession of the partnership property, and wrongfully refuses to let in the other partner, he will be accountable in a court of equity to such partner for his share of the profits made. *Adams v. Kable,* 6 B. Mon. 384. So long as the partnership assets are used to make the profits, so long must such profits be accounted for. *Crawshay v. Collins,* 15 Ves. 218; *Washburn v. Goodman,* 17 Pick. 519; *Brown's Appeal,* 89 Penn. St. 139.

Claim is also made that, the defendant having taken full charge of the affairs and business of the partnership, he is entitled to compensation for such services. There is no claim that any such agreement existed between the parties. The general rule is that, though each partner is bound to bestow his services and labor with diligence and skill, he is not entitled to any reward or compensation, unless there be an express stipulation between the partners for that purpose. *Anderson v. Taylor,* 2 Ired. Eq. 420; *Bradford v. Kimberly,* 3 Johns. Ch. 433. There are no circumstances shown in the present case which would entitle the defendant to compensation for such service, in the absence of such agreement.

The decree of the court below must be affirmed, with costs. The cause will be remanded to the court below for the purpose of the account being taken in accordance with this opinion.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred.

MORSE, J. I do not think there should be any accounting after the filing of complainant's bill.

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CHARLES SADOWSKI v. THE MICHIGAN CAR COMPANY.

Master and servant—Negligence—Fellow-servants.

1. The court cannot properly pass upon the question of negligence, except in cases where the facts are such that all reasonable men would be likely to draw from them the same inference.
2. The doctrine of the non-liability of the master for injuries sustained by a servant through the negligence of his fellow-servant has no application unless the one injured and the one at fault were engaged in the same general employment, and whatever conflict has arisen in cases has been as to what should be considered the same general employment.
3. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and are not, as to each other, fellow-servants.
4. In this case a common laborer employed in a lumber-yard is held not to have been a fellow-servant with the yard foreman and his men, who by the direction of the superintendent dug a ditch in which to lay a water-pipe, left it uncovered, whereby the laborer was injured.

Error to Wayne. (Hosmer, J.) Argued November 11, 1890. Decided December 24, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

William H. Wells, for appellant.

James H. Pound (*F. W. A. Kurth*, of counsel), for plaintiff.

[The points of counsel are fully stated in the opinion.—REPORTER.]

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CAHILL, J. This is an action for damages for personal injuries received by the plaintiff July 2, 1887, while in the employment of the defendant. The verdict was for the plaintiff, and defendant brings error.

I take the following statement of facts substantially from appellant's brief:

Defendant was engaged in the manufacture of cars in the city of Detroit, and employed about 2,200 men. One part of its premises was known as the "lumber-yard." James McGregor was the general superintendent. His son, James C. McGregor, was foreman of the lumber-yard. Plaintiff had worked for the defendant about five years as a common laborer. His work was in the lumber-yard. At the time of the injury, he was engaged with his mate in conveying pine strips from the piles of lumber in the yard to the planing-mill. Tramways extended through the yard from place to place, as shown by the map appended. Upon these tracks ran small platform cars, or trucks, about four feet by six feet, called "larries," which were loaded with the material and pushed by the men to the place where the material was needed. There were small turn-tables at the crossings and intersections. The plaintiff had been at work with a larrie for over a year, and was familiar with the tracks. The men were accustomed to use whichever track they could use to the best advantage.

At the time of the accident, the plaintiff with his mate was pushing a heavy load of strips, which was taller than Sadowski, so that he could not look over it. The pile from which the larrie was loaded was near track No. 4 on the map. From the piles at the north end of the yard, two main tracks ran to the planing-shop at the south end of the yard, one of the tracks being on the east, and the other on the west, side of the kiln and planing-shop. These main tracks are numbered 1 and 5 on the map. Ordinarily, the course would have been for plaintiff to push the larrie along track 4 to turn-table at junction with track 6; thence east along track 6 to turn-table C; thence south along track 1 to the planing-shop. When plaintiff had reached the point indicated on the map by letter L, he observed a team with a load of planks at the point K upon the track. This prevented their reaching the mill by track 1, and, without direc-

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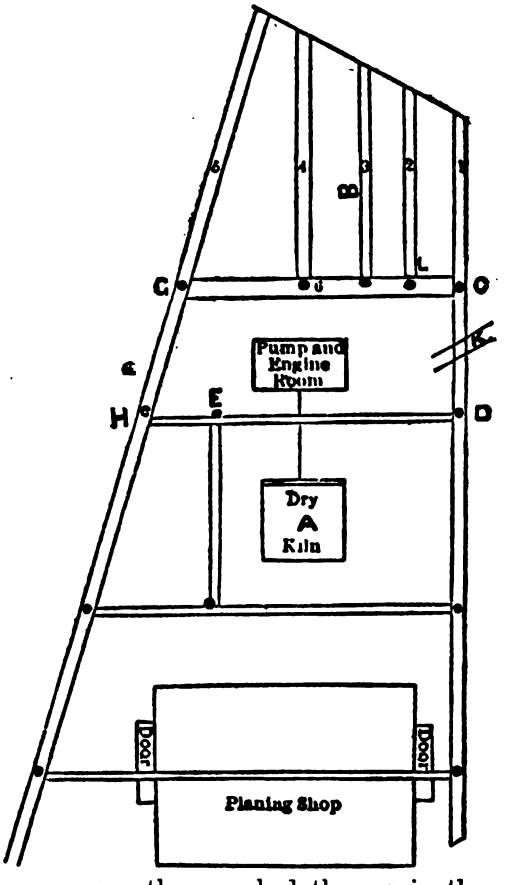

tions from any one, they pushed the car in the opposite direction to the turn-table G; thence along main track 5 to turn-table H, intending to go thence by the cross-track to the main track 1, and thence to the planing-shop. At the turn-table H the gang-boss met them, and told them to hurry up. He helped them turn the car around, and helped to shove it. The gang-boss took hold with plaintiff and his mate and helped push the larrie. They pushed it over the turn-table H, and along the cross-track towards the turn-table D, and, when some 18 or 20 feet from the turn-table H, they came to a ditch which had been dug the night before under the track, into which the plaintiff fell. The two men who were

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with him saw the ditch, and stepped over it. They were on the outside at the corners of the car, while plaintiff was in the center. The plaintiff was pushing with his breast and shoulders, and exerting all his strength.

The ditch was about four feet deep, and about three or four feet wide at the top. It was intended for a water-pipe for a pen-stock. It was dug there under the general superintendent's directions. James C. McGregor, the yard foreman, received orders from the superintendent to put in the water-pipe. He went to Murtisfield, the gang-boss; told him to put on some men, and start them to digging. They completed the ditch the night before the accident, and left it uncovered. The accident occurred about half past 8 in the morning. The job of putting in the water-pipe, involving the digging of similar ditches, had been going on about a week. The space between the turn-table and the ditch was unobstructed to the view; the tracks were laid upon the level ground. Plaintiff knew all the tracks, had used most of them, and was accustomed to use whichever could be used to the best advantage. The dirt from the ditch was piled upon the side. Plaintiff saw the dirt, but could not say on which side it was. He testified that he had no warning to look out for the ditch, and that he did not know that the ditch was there, and from the way in which he was pushing he could not see the ditch until he fell into it.

The errors relied on by defendant for a reversal of the judgment are two:

1. That the court erred in charging the jury that it was the duty of the master to furnish his employés with a suitable and safe place in which they may perform their work.

2. His refusal to charge the jury that the verdict must be for the defendant.

It is claimed that the charge of the court complained of amounted to an instruction that the defendant was an insurer of the safety of its premises; whereas it is contended that the rule is one of reasonable care simply, and that an employer is not responsible for any neglect to provide his servant with a safe place in which to work, unless it appear that such neglect is due to a want of

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reasonable care on the part of the master. Conceding the rule to be as contended for by counsel for defendant, I do not find the charge of the court, taken as a whole, open to the criticism he makes. It is true the charge starts out with this language:

"It is the duty of a master to furnish his employés with a suitable and a safe place in which they may perform their work; and he cannot delegate this responsibility so as to make the person who is intrusted with this duty a co-employé."

This language is quoted almost exactly from that of Mr. Justice MORSE in *Van Dusen v. Letellier*, 78 Mich. 502; but neither Mr. Justice MORSE nor the learned circuit judge intended to lay down a rule which would make the master the insurer of those who were in his employ. The language used in each case is to be construed with reference to the facts about which they were speaking. The circuit judge in this case supplemented the language objected to with the following:

"The question for your consideration in this case is whether, after having constructed that ditch, they were *negligent* in leaving it unguarded. * * * Unless you find in this case that the defendant has been *guilty of negligence*, unless you find that the digging and leaving the ditch unguarded as I said before, at the point where the rails intersected the ditch, was such *negligence as a reasonably prudent person* would not have been guilty of, there can be no recovery in this case."

This language is only consistent with the idea that the defendant must be found by the jury to have been guilty of a want of reasonable care in providing a safe place for the plaintiff to work in before it could be held liable.

In support of the second proposition, that the jury should have been instructed for the defendant, counsel says:

"1. There is no evidence of negligence on the part of the defendant.

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"2. If there was any negligence, it was that of a co-employé."

We are not prepared to say as a matter of law that the leaving of this ditch uncovered, under the circumstances, was not negligence. It was entirely unnecessary. It was accompanied with more or less risk. It was well known by the foreman of the yard, and by the gang foreman, under whose immediate direction the work was done, that these tracks were liable to be used at any time of the day. It was known that a man standing immediately behind one of the larries, pushing a load with all his strength, would have little opportunity to look about him for unexpected dangers. The question of negligence, where the case from the facts is not free from doubt, should be left to the jury. *Detroit, etc., R. R. Co. v. Van Steinburg,* 17 Mich. 99; *Hassenyer v. Railroad Co.,* 48 Id. 205; *Sheldon v. Railroad Co.,* 59 Id. 172. The court cannot properly pass upon the question of negligence, except in cases where the facts are such that all reasonable men would be likely to draw from them the same inference. *Lake Shore & M. S. R. R. Co. v. Miller,* 25 Mich. 274.

It remains for us to consider whether the negligence was that of a fellow-servant. It was said in *Morton v. Railroad Co.,* 81 Mich. 423, that the rule may now be considered settled in this State, as well as in most of the states, not only that a master is bound to use reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another, so as to relieve him from personal responsibility. What was there said, in reference to tools and appliances for the use of workmen, is equally true of the duty of the employer in providing a safe place for his servants to work in. *Van Dusen v. Letellier,* 78 Mich. 502. It is contended by defendant's counsel that—

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"It is to reason fallaciously to say that a master is bound to furnish and maintain a safe place to work; that the negligence of a servant in performing his work has resulted in unsafety; that this is a violation of the duty of the master; and that in such violation the servant represents the master. If such reasoning were sound, there would be no decision of any court relieving a master from liability where a servant was injured through the fault of another; for the injury necessarily is occasioned by the place or appliance being made unsafe by the act or omission of the other servant. The happening of the accident, and the unsafe condition of the premises at the time of the accident, are not conclusive that the obligation of the master to use reasonable diligence has not been fulfiled, or that the unsafe condition is not the result of the lapse from duty of another servant, who is employed in such a capacity that he and the injured person are mutually subject to the consequence of each others' faults."

But the ingenious reasoning of counsel fails to take account of an important limitation upon the rule which relieves a master from liability when a servant is injured through the fault of another. That doctrine was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances, when provided, and they are not therefore, as to each other, fellow-servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his

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negligence. In *Ford v. Railroad Co.*, 110 Mass. 240, it was said:

"The agents who are charged with the duty of supplying safe machinery are not, in a true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and separate departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require."

In *Railroad Co. v. Herbert*, 116 U. S. 653 (6 Sup. Ct. Rep. 590), Mr. Justice Field, speaking of the distinction that he found to exist between the providing of safe machinery and the business of handling and moving it, said:

"The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it."

Applying this rule to the facts under consideration, if it be true that the lumber-yard in which the plaintiff was employed, and which it was the duty of the master to keep in a reasonably safe condition, was, through the negligence of any one employed by the master to put in the water-pipe, left in a dangerous condition, that negligence is attributable to the master. The relation of fellow-servants did not exist between the plaintiff, who was employed in handling lumber, and McGregor and his men, who were engaged in a distinct labor affecting the safety of the yard as a place to work in.

It follows that there is no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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HARRY SHERMAN v. THE BOARD OF SUPERVISORS OF SANILAC COUNTY.

Taxes—Law of 1889—Fees of county clerk.

A county clerk presented a claim to the board of supervisors for fees for issuing subpœnas to delinquent tax-payers under the tax law of 1889 (Act No. 195), and for moneys paid the register of deeds for searches in his office to ascertain the names of such owners, which claim was rejected; and in denying a *mandamus* to compel its allowance it is held:

a—There is no provision of law entitling the clerk to such *fees*, nor is he required to make such searches.

b—The claim of relator is not one which the board of supervisors can be compelled to audit and allow, although, upon a proper showing, the board may be required to act under section 100 of said tax law, and determine what amount of compensation, if any, the relator shall receive for his services under the law, and how it shall be paid.

Mandamus. Submitted December 2, 1890. Denied December 24, 1890.

Relator applied for *mandamus* to compel the allowance of certain fees earned and expenses incurred as county clerk under the tax law of 1889. The facts are stated in the opinion.

E. C. Babcock and *E. F. Bacon*, for relator.

CAHILL, J. This is an application for a *mandamus* to require the board of supervisors of Sanilac county to audit and allow relator certain sums as his fees and expenses as county clerk, acting as register in chancery, in the matter of the petition of the Auditor General, filed under section 52 of the tax law of 1889 (Act No. 195, 3 How. Stat. p. 2936).

It appears that, on the hearing of said petition in the

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circuit court for the county of Sanilac, in chancery, a decree was entered on April 30, 1890, in favor of the State, against certain lands described in the petition, for the taxes assessed on said lands, together with the fees and expenses incurred by certain officers in relation thereto; that, among other fees so included, were the clerk's fees, acting as register in chancery in issuing the subpœnas to the delinquent tax-payers, and also for certain disbursements made by the clerk for searches to ascertain who were the owners of the lands, that the clerk might know against whom to issue such subpœnas. There was taxed by the court, and assessed against each parcel of land the owner of which was personally served with subpœna, and who allowed a decree to pass against his land, the sum of one dollar, to cover the clerk's fees and disbursements. These amounted, in the aggregate, on 669 descriptions, to $669. This amount, relator says, has already passed to a decree in favor of the State, and that, of this amount, $308 has actually been collected, and is now in the hands of the county treasurer, while the balance of $361 is included in the sums for which certain of the lands were bid in to the State, and are now subject to redemption at the Auditor General's office. In addition to the foregoing items, relator claims that he performed the same services, and made the same disbursements, in relation to other descriptions of land on the Auditor General's tax record, against which no decree was rendered, or, if rendered, which did not include the item of one dollar for his fees and expenses, because no personal service of subpœna could be made; that the total amount of the fees and expenses due him on account of such descriptions is the sum of $229.25, to which add the item first referred to, $669, and we have a total claimed by relator of $898.25.

Relator presented his claim for the above amount to

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the board of supervisors on November 10, 1890. The claim was referred to a committee, which reported adversely to the allowance of it, on the ground that they could find no law authorizing its payment. The report of the committee was accepted and adopted, and the board adjourned *sine die*.

Upon these facts, the questions presented are whether there is any provision of law which entitles the relator to the fees and disbursements claimed by him, and, if so, then is his claim against the county such a one as we can compel the board of supervisors to audit and allow?

As to the first point, we are not cited to any express provisions of law which give the clerk fees for issuing the subpœnas in tax cases. Section 53 of the tax law of 1889 prescribes the fees of the officer who serves the subpœna, but makes no express provision for the clerk. Section 75 of the statute provides that—

"All compensation of county officers and expense incurred by them under the provisions of this act shall be paid by the county."

Section 100 provides that—

"County officers shall be paid for services under this act, by salary, or otherwise, *as the board of supervisors shall determine.*"

It is not claimed by the relator that the board of supervisors of his county has acted under section 100, and determined how he should be paid for his services under the tax law, nor that the board has declined to act.

The county clerk is the *ex officio* clerk of the circuit court. How. Stat. § 577, provides that the county clerk—

"Shall receive for all services *rendered the county in criminal cases, and as clerk of the circuit court*, and for his services as clerk of the board of supervisors and as clerk of the board of county and district canvassers, such

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salary as the board of supervisors may fix; for his services in civil cases, and other matters, such fees and compensation as shall be provided by law."

By section 6592, it is provided that the several circuit courts shall be courts of chancery, the powers of which shall be exercised by the circuit judges. By section 6594, the clerk of the circuit court is *ex officio* register in chancery. Construing these various sections together, it seems clear that section 577 is broad enough to cover all services "rendered the county" as clerk of the circuit court, whether on the law or the chancery side.

It is said by relator's counsel that this tax law is a new statute passed since relator's salary was fixed by the board; that it requires of him extraordinary services, not contemplated when his salary was fixed; that the tax law clearly contemplates that he shall have compensation for such services. This is a consideration that might well be addressed to the board of supervisors, upon whom the Constitution and laws devolve the duty of fixing the salary or compensation of the clerk. Const. Art. 10, § 10; How. Stat. § 483, subd. 9; Tax Law of 1889, § 100, *supra*. We cannot give this suggestion any weight. The salaries of public officers do not go up and down according as the law places more or less duties on them. When one accepts a county office, he knows that the salary must, by the Constitution, be fixed by the board of supervisors, and that no other authority has any power over it. If, after trial, he becomes satisfied that the salary is too small for the services required, the statute allows him to resign. How. Stat. § 647. While he holds the office, however, he must perform its duties, and every willful neglect to do so is punishable as a misdemeanor. How. Stat. § 9259.

It is said that no provision is made in the statute for ascertaining the name or place of residence of the delin-

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quent tax-payer against whom subpœna is to issue, nor for compensation to the clerk or other officers for making a search for that purpose; that the best way of ascertaining the name and residence of the delinquent tax-payer is by a search of the records in the office of the register of deeds; and that the relator has caused such search to be made, and has incurred in so doing an actual expense of $239, which he has paid, or is liable for. But there is no provision in the tax law requiring the clerk to search the records to ascertain who is the owner of the lands on the tax record, nor to incur any expense in so doing. There is ground for saying that the tax law requires amendment in this respect. The purpose of the statute being to collect the public revenues, no doubt that would be greatly facilitated by giving notice to the person actually interested in the land at the time the proceedings to enforce the lien are commenced, if practicable; but, to accomplish this, the statute will require amendment. In tax proceedings, the officers cannot assume duties not required of them by law, and charge the expense thereof against the tax-payer. Section 53 provides that—

"All fees and expenses incurred by *virtue of this section* shall be a charge against the real estate on account of which the same were incurred."

As the only fees or expenses provided for in such section are those earned or incurred by the officer in making service, it would seem that only such fees and expenses could be charged against the land. This last question, however, is not involved here, and we do not decide it. We allude to it only because it may merit the attention of the Legislature. If it is desirable to fix the clerk's fees, and to make them a charge against delinquent lands, the statute should so provide.

The relator's claim is not such a one as the board of

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supervisors can be compelled to audit and allow, although, upon a proper showing, the board may be required to act under section 100 of the tax law, and to determine what amount of compensation, if any, the relator shall receive for his services under such law, and how it shall be paid.

The *mandamus* as prayed must be denied.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred.

MORSE, J. I concur in the result.

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HENRY H. APLIN, AUDITOR GENERAL, v. HERBERT L. BAKER.

Taxes—Law of 1889—Subpœnas—Fees of officers—Costs.

1. The State is not liable for costs in case of a decision in *favor* of a contesting tax-payer in proceedings under the tax law of 1889 for the sale of lands delinquent for taxes.
2. On filing a tax petition under the tax law of 1889 (Act No. 195), upon which 45 descriptions of land belonging to the same person appeared as delinquent, the clerk issued 45 subpœnas directed to such owner, and requiring him to appear and answer the petition, and inserted in *each* of 44 of the subpœnas *one* of said descriptions, all of which subpœnas were served by the sheriff. The owner tendered to the county treasurer the amount due for taxes, interest, and charges, and the legal fee for issuing and serving *one* subpœna, which tender was refused, but was held sufficient by the court below, which decision is affirmed on appeal.

Appeal from Wayne. (Reilly, J.) Argued November 13, 1890. Decided December 24, 1890.

Petition for sale of lands delinquent for taxes, under

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Act No. 195, Laws of 1889. Board of Auditors of Wayne county appeal. Affirmed, except as to costs. The facts are stated in the opinion.

Henry M. Duffield, for appellants.

Baker & Clark, for defendant.

CAHILL, J. This is a case arising upon a delinquent tax petition filed by the Auditor General in Wayne county under the tax law of 1889 (Act No. 195; 3 How. Stat. p. 2936).

The respondent, Baker, is the owner of 45 lots situated in the city of Detroit. These lots were separately entered on the assessment roll. The tax record referred to in the petition of the Auditor General does not state the names of the owners of the various parcels of land. The names of the owners were ascertained by the clerk of the Wayne circuit court by inquiry at the abstract office. The clerk issued separate subpœnas, addressed to the respondent, for each lot or parcel of land assessed, and delivered the same to the sheriff. The sheriff served 45 subpœnas upon the respondent, and the cost of the issuance and service of these subpœnas was added upon the tax record to the amount of the taxes, interest, and other charges against each parcel of land. Each subpœna described a particular lot, respecting which it purported to be issued.

The respondent tendered the county treasurer the amount specified in the petition as due for unpaid taxes, interest, and charges, and in addition the legal fees for issuing and serving one subpœna. This tender was refused because it did not include fees for issuing and serving all of the subpœnas. A formal objection to the allowance of these items of cost was filed in the circuit court, and on a hearing there the court held that the tender was sufficient; that the issuing of more than one

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subpœna to the same defendant was unauthorized, and decreed accordingly. From this decree the State appeals.

The question involved, owing to the incompleteness of the statutory direction, is not without difficulty. The statute does not require the subpœna to describe the land supposed to belong to the delinquent tax-payer on account of which it is issued, although there are important reasons why it should do so. It provides no means of ascertaining the name or place of residence of the delinquent tax-payer. Yet, section 53 provides that,—

"After the filing of said petition, the county clerk, acting as register in chancery, shall issue *a subpœna directed to each delinquent tax-paper who is a resident of this State,*" etc.

We held in the case of *Sherman v. Board of Supervisors, ante,* 108, that under the present statute there was no authority in the clerk to incur any expense in ascertaining who were the owners of the lands on the tax record. It is urged by counsel for the State that these proceedings contemplate the establishment of a lien upon each parcel of land for the particular tax and charges against it; that it is the parcels of land that are delinquent, and not the owner; that the proceeding is, in effect, a separate suit against each parcel, as to each of which the owner may make a separate and distinct defense, and as to each of which the court may make a separate and distinct decree; that, by analogy to other suits, a subpœna should issue as to each of such parcels, whether the person upon whom service is to be made be the same in any two of them or not. In support of this view, we are referred to the proviso in section 53, which reads as follows:

"*Provided,* That when two or more subpœnas are served at the same time or place, upon different [delinquent] tax-payers, only one travel fee shall be charged and paid."

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A comparison of the original printed bill, as it passed the Senate and House, with the enrolled copy on file in the office of the Secretary of State, shows that the word "delinquent," printed in the Session Laws in brackets, was the word used in the original bill, and that the word "different" was an error in enrollment. Read in this way, the proviso seems to contemplate the service of two or more subpœnas upon the same delinquent in case he is the owner of more than one parcel of land.

But, however plausible these arguments may be, they must give way to the more substantial ones that are opposed to an interpretation so needlessly oppressive to the tax-payer. The purpose of these proceedings is not to punish the delinquent tax-payer, nor to enrich the officers charged with conducting them, but to collect the public revenues. This object is not subserved by adding to the original burden excessive and needless costs and expenses. The aggregate of the taxes, including interest, charged against these 45 lots on the Auditor General's petition, is $22.37. To this amount the Auditor General added $1 to each description for costs of advertising and other expenses of sale, making $45. The clerk's and sheriff's fees here in controversy amount to $66.35, so that if counsel for the State is right in his contention, before the State can get its $22.37 of revenue, the owner of the land must be able to pay in addition thereto $111.-35, or nearly five times as much, in costs and expenses. No merely doubtful interpretation of the statute will justify us in sustaining such a result. In the performance of his duty under the law, it would have been much less trouble for the clerk to have issued one subpœna containing a description of all respondent's lands, as they appeared in the tax record, and it would have answered the same purpose as a notice of the proceedings.

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So far as the fees of the clerk are concerned, we intimated a doubt in *Sherman v. Board of Supervisors, ante,* 108, whether they were properly taxable against the land, the amount of such fees not having been fixed by section 53, and section 100 having expressly left the question of the clerk's compensation to be determined by the board of supervisors. We only say here that the clerk was certainly not entitled to fees for issuing more than one subpœna.

The same rule must apply to the sheriff. It is said that he was not to blame; that the writs came to him fair on their face, and his only duty was to serve them. Granting that, it does not follow that he can call upon the respondent to pay him his fees. The respondent is in no way responsible for the issuing of the unnecessary writs, and is no more liable to pay the sheriff for the unnecessary trouble he has taken than is any other person.

Respondent claims that no decree should have been rendered against his lands for any sum, as he had tendered before the hearing the amount which the court found to be due; but the respondent has not appealed, and we cannot review the correctness of that practice at his request here.

The court below awarded the costs to the appellee. We find no warrant for this in the tax law. The only provision relating to costs is at the close of section 56, which authorizes the court to decree costs against a person contesting a tax, if the tax is adjudged valid. There is no provision for decreeing costs against the State. As costs are purely statutory, we must hold that the power conferred on the court by section 56 is exclusive of any other.

The decree of the court below, except as to costs, is

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affirmed, and the respondent will be allowed to release his lands from the decree by the payment of the sum therein adjudged to be due.

The other Justices concurred.

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HENRY H. APLIN, AUDITOR GENERAL, v. ADOLPH SLOMAN.

Constitutional law—Taxes—Law of 1889—Petition of Auditor General.

1. The tax law of 1889 (Act No. 195) is held to be constitutional.
2. A petition for the sale of delinquent tax lands, conforming in its statement of facts to the form prescribed by section 52 of the tax law of 1889, is sufficient.

Appeal from Wayne. (Reilly, J.) Argued November 12, 1890. Decided December 24, 1890.

Petition for sale of lands delinquent for taxes, under Act No. 195, Laws of 1889. Defendant appeals. Affirmed. The facts are stated in the opinion.

B. W. Huston, Attorney General, and *Henry M. Duffield,* for petitioner.

Sloman, Berry & Duffie (Hamilton G. Howard, of counsel), for defendant.

CAHILL, J. The Auditor General filed a petition in the Wayne circuit court, under the tax law of 1889, to enforce the lien for State and county taxes of 1887 upon

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respondent's land. Respondent demurred to the petition upon the following grounds:

"1. That the tax law of 1889, under which said petition is filed, is unconstitutional and void, for the following reasons:

"*a*—It provides for advertising a sale of lands for unpaid taxes before obtaining a decree therefor.

"*b*—It cuts off the common-law right of trial by jury, which existed in such cases when the Constitution of 1850 was adopted.

"*c*—It makes the decision of the circuit judge, as to the exclusion or admission of evidence, final, thus cutting off the right to appeal, except as the circuit judge may choose to permit.

"*d*—It deprives a person of his property without due process of law.

"*e*—It deprives him of his day in court.

"*f*—The act undertakes to make the proceedings in the circuit court in chancery administrative instead of judicial.

"*g*—In that it attempts to subvert the powers of the court in chancery by taking from it its judicial power, and conferring upon it simply administrative privileges.

"2. Because said petition does not show the jurisdictional fact that no sale of the lands described therein for nonpayment of taxes has been made, as is contemplated by section 71 of the tax law of 1889."

Upon a hearing before Hon. Cornelius J. Reilly, circuit judge, the demurrer was overruled, and a decree entered against the land for the amount of the taxes, interest, and charges shown in the tax record to be due.

It is objected to this decree that upon the overruling of the demurrer the decree was entered without allowing the respondent to answer the petition on file by filing objections to the validity of the tax. The statute contemplates that all objections to the proceedings taken by the Auditor General for the enforcement of this lien shall be taken under section 53, and, whether such objections go to the validity of the law or of the proceedings taken under it, they must be made and filed in writing on or before the day fixed for the hearing of the petition, and no objections not so stated and filed can be allowed. If

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respondent had any objection to the validity of the taxes based on other grounds than such as were stated in his demurrer, they should have been made and filed under this section. The statute does not contemplate any merely dilatory pleading, and a resort to such practice would greatly impede the collection of the public revenues.

Counsel for defendant have refrained from discussing at length the constitutional questions raised by the demurrer, giving as a sufficient reason therefor that all of them have been so recently and so fully considered by this Court in the *State Tax-Law Cases*, reported in 54 Mich. 350, that it would be difficult to throw any additional light upon the questions involved. I am in accord with the views expressed by COOLEY, C. J., in his very learned opinions in those cases, and should not be able to add anything to their weight by an extended discussion. I hold the law to be constitutional.

The last point made by defendant, that the petition does not state the fact, claimed to be jurisdictional, that a sale of the lands described therein has not been made, is without force. The form of the petition, so far as the facts necessary to be stated is concerned, is prescribed by section 52 of the act, and the petition in this case contains all the statutory requirements.

The decree below is affirmed, with costs.

CHAMPLIN, C. J., concurred with CAHILL, J. MORSE, LONG, and GRANT, JJ., concurred in the result.

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HENRY H. APLIN, AUDITOR GENERAL, v. THE BOARD OF SUPERVISORS OF MIDLAND COUNTY.

Taxes—Accounting between State and county—Estoppel—Mandamus.

1. Where an application for *mandamus* is heard upon petition and answer, the facts stated in the answer must be taken as true.
2. Losses arising from the sale of the "five-year list" of State tax lands, so called, under the tax law of 1869, are improper charges against the counties, and their collection cannot be enforced. *Auditor General v. Ottawa Co.*, 76 Mich. 295.
3. In this case it is held that the claimed settlements of the State with the county do not show such an accounting as should estop the county from asking that charges for losses arising from the sale of the "five-year list" of State tax lands, so called, under the tax law of 1869, should be stricken from the account as stated by the State and sought to be enforced by *mandamus*.

Mandamus. Submitted November 12, 1890. Denied December 24, 1890.

Relator applied for *mandamus* to compel respondent to apportion among the townships of the county the amount of an indebtedness claimed to be due the State from the county. The facts are stated in the opinion.

B. W. Huston, Attorney General (*Moses Taggart,* of counsel), for relator.

M. H. Stanford and *William D. Gordon,* for respondent.

LONG, J. This is a petition for *mandamus* to compel the board of supervisors of Midland county to apportion among the several townships of that county an amount

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of indebtedness claimed to be due the State from the county.

The controversy arises over the amount found by the Auditor General to be due the State from the county on October 1, 1888. In the statement of account forwarded by the Auditor General to the clerk of the board of supervisors of that county, it appears that the total State tax to be apportioned for that year, under the various acts of the Legislature, was $3,856.54. In addition to this, the Auditor General notified the county clerk that there was also to be levied, as a portion of the county taxes as required by section 22, Act No. 153, Laws of 1885 (3 How. Stat. § 1169*n*1), the indebtedness of the county to the State, amounting on July 1, 1888, to the sum of $18,799.95. The controversy here grows out of this old account. This notice was laid before the board of supervisors at their October session of 1888, and a committee of three was appointed by them to investigate the account, it being claimed by the board that the old account was much less than stated by the Auditor General.

The petition for the writ of *mandamus* sets out that annual settlements were had between the State and county for several years, up to and including the year 1883, and that the Auditor General, in making up the amount of this old indebtedness, took the settlement made in 1883 as a basis of the account. Taking that as a basis, the Auditor General makes the account as above stated. The Auditor General claims that he is justified in taking this as a basis, as in all the years prior thereto there had been annual settlements, and that the county is estopped by such settlements from opening up the old account, and asking an adjustment of such prior accounts.

The contention of the respondent is that no such annual settlements were made; that the county treasurers

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of that county had no power to bind the county in making settlements with the Auditor General; and that, if the account is properly recast, the amount due the State from the county would be less by several thousand dollars than claimed by the Auditor General. The respondent takes as a basis for the accounting the state of the account between the county and State on October 1, 1868.

The petition states that there was a balance due from the State to the county of Midland, on October 1, 1883, of $10,880.18, and, on November 19, 1883, this amount was paid over, and the receipt of the treasurer taken therefor, and that the payment of this amount adjusted all there was due the county at that date, and that due notice was given to the county clerk to be laid before the board of supervisors of such statement; that, in each year since that date, the Auditor General has rendered a correct statement of the account with that county, and transmitted the same to the clerk of that county. It is also alleged that every dollar sought to be enforced against the county in this proceeding arose from taxes legally apportioned to Midland county by the State since the year 1883, and items charged up under the law since that time. The Auditor General also sets out in his petition what he terms the state of the account from year to year since 1875, for the purpose, as it is claimed, of showing that settlements were had from year to year during that time. It is also alleged in the petition that the form of account kept with Midland county, the charges made, and settlements had from year to year were of the same class and character as with all other counties in the State.

The answer denies that any settlement was had between the county and State in 1883, and alleges that, when said sum of $10,880.18 was paid to the county treasurer, he

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was informed that it was paid on account of the delinquent tax of 1881, and the treasurer understood he was receipting for such delinquent tax and nothing else. It is denied that said sum represented the true amount due from the State to the county at that time. It is claimed that, at the time these moneys were paid over to the county in 1883, the sum of $16,880.25, principal and interest, arising under section 124 of Act No. 169, Laws of 1869, was wrongfully used by the Auditor General to swell the debit side of the account in favor of the State, and that no settlement has been had between the county and State since the year 1868. The answer also denies that the claim presented by the State arises from taxes apportioned to the county since the year 1883, but avers that a large part of said indebtedness arises from taxes apportioned to the county prior to the alleged settlement of that year. It is denied by the answer that the county treasurer had power to bind the county on any of such alleged settlements, and alleged that the board of supervisors have never regarded such settlements as final and conclusive against the county. The answer and the exhibits attached set out therein what is claimed to be the true state of the account as it should appear from year to year, from 1868 to 1888. It is also alleged in the answer that the Auditor General has charged the county with the amount for which lands were bid off to the State at the October sales in each year, and charged interest thereon to the county; that, one year from the time such bids were so charged, they were credited back to the county without interest being added, thus charging the county interest for one year on such bids; that redemptions were made during the year, and no credit given for the interest on such redemptions. These are the only items specifically set out in the answer that have arisen since 1883, and enter into the amount sought to be

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enforced, unless the amount claimed includes the deficiencies arising under the five-year list. It is alleged by the answer that this amount now claimed by the State does include such charges,—that is, that the account has been so kept by the Auditor General that these charges have been carried in the account from year to year, when they are now sought to be collected from the county.

"That the Auditor General charged to said county, under said section 124, in the year 1870, for principal and interest, the sum of $1,374.89, and in the year 1871 the sum of $917.07, for principal and interest, and in the year 1872 the sum of $1,346.75, for principal and interest, and in the year 1873 the sum of $742.06, for principal and interest, and in the year 1874 the sum of $1,420.01, for principal and interest, and in the year 1875 the sum of $2,516.83, for principal and interest, for losses on lands sold under said section, which said lands had been bid in by the State prior to the year 1869, and that said sum, with the interest thereon to July 1, 1875, amounts to $9,666.39; that no sum whatever was credited to Midland county under said section 124; that these charges are still in said account, and have been illegally used to swell the account against the county, and that on the 1st day of October, 1883, said amounts, with the interest thereon, were the sum of $16,880.25, and that on that day the State owed the county said sum of $16,880.25, in addition to the other sums due said county from the State, and that on July 1, 1888, said illegal charges with interest thereon amount to the sum of $23,294.22, which should be credited back to said county in the said account of which it is a part; that respondent always supposed that the indebtedness claimed arose from the said illegal charges."

The facts stated in the answer must be taken as true. *Hosier v. Board*, 45 Mich. 340; *Pack v. Presque Isle Co.*, 36 Id. 380. Taking the answer as true, it appears that there entered into this account, in the year 1883, the sum of over $16,000, made up of charges arising under section 124 of Act No. 169, Laws of 1869, which were losses sustained by the State upon sales of tax lands held

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by the State for five years. It has been decided many times by this Court that these were improper charges against the counties, and the collection could not be enforced. *Auditor General v. Monroe Co.*, 36 Mich. 76; *Auditor General v. Saginaw Co.*, 62 Id. 579; *Auditor General v. Ottawa Co.*, 76 Id. 295; *Auditor General v. Shiawassee Co.*, 74 Id. 536.

To avoid this claim, however, it is insisted by counsel for the Auditor General that settlements have been had from year to year, for many years, up to and including the year 1883, by which the county is now estopped from setting up the claim that these illegal items enter into the account. Claim is also made by counsel in their brief that these items are no part of the account presented, but that respondent seeks to set them up by way of set-off or counter-claim. The answer negatives this position. The only question for consideration then presented is the validity of these claimed settlements, or whether the county is estopped by the dealings had between it and the State from making claim that these items enter into the account. It has been held in the cases above cited that this is an amount which the State had no right to charge up to the county. The account has been carried along by the State for years, with these items included in it. No question has been raised, until this proceeding was commenced, but that the account was properly made up, and of legal items. It does now for the first time appear just what the account is made up from, and, when the board of supervisors ascertained that it included these losses on the five-year list, they refused to apportion or assess the taxes for those amounts, and we think very properly. The figures taken from the books of the Auditor General's office and from the county treasurer's office are presented in this record, running through a period of nearly 20 years. We do

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not feel called upon to go over them in detail or to state them here. The claimed settlement does not show such an accounting, in our view of the case, as should estop the county from asking that illegal items should be stricken from the account.

With the losses charged to the county arising from the sale of the five-year list of lands stricken from the account, and the county given credit, if it has not been given it, for interest on redemptions made at the Auditor General's office where the county has been charged interest on such taxes for the year, the balance of the account should be recognized by the county of Midland, and apportioned as provided by the act of 1885.

The writ of *mandamus* must be denied.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred with LONG, J.

CAHILL, J., (*dissenting*). The pressure of business, incident to my retirement from this Court, has made it impossible for me to investigate this case as fully as I would like, but, from the examination I have made, I cannot concur in the result reached by my brethren. It seems to me that the conclusion reached allows the respondent to set off its claim, arising under the invalid law of 1869, against the valid claim of the State. This we held could not be done in *Auditor General v. Grand Traverse Co.*, 73 Mich. 182. See, also, *Ambler v. Auditor General*, 38 Id. 736. It appears clear to me that the unsettled matters of account were settled in 1883, and the claim of the State in this proceeding is for State taxes apportioned to the county since that time. To allow the county to defend against this claim by asserting a counter-claim growing out of the other matter is, it seems to me, the same in effect as to allow a suit to be brought against the State for such counter-claim.

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HENRY H. APLIN, AUDITOR GENERAL, v. OLIVE B. FISHER.

Municipal corporations—Public improvements—Petition by property-holders—Authority of administrator and guardian—Husband and wife—Estate of entirety.

1. Parol testimony is admissible to show that joint grantees are husband and wife where the fact of such relationship is not stated in the deed. *Dowling v. Salliotte*, 83 Mich. 131.
2. The *fact* whether or not the requisite number of persons have signed a petition for the improvement of a street, when the power to make it depends upon the signatures to the petition of a given number or proportion of the property-holders to be affected, can be inquired into, and the want of such number of signatures shown as a defense, in an action to collect the assessment, if the statute governing the proceeding does not provide that the determination of the proper municipal board shall be *conclusive* on the subject.
3. Neither a guardian nor an administrator has authority to bind the estate by signing a petition for the improvement of a highway presented to a township board under a statute requiring such petition to be signed by a majority of the *resident property-holders* upon such highway; nor can a husband, who occupies land under a contract running to himself and wife *jointly*, be counted as such resident property-holder, unless the petition is also signed by his wife.

Appeal from Kent. (Grove, J.) Argued November 12, 1890. Decided December 24, 1890.

Petition for sale of lands delinquent for taxes, under Act No. 195, Laws of 1889. Petitioner appeals. Affirmed. The facts are stated in the opinion.

Smiley & Earle, for petitioner, contended:

1. The township board acts as a judicial body in considering matters presented to it; citing *Wall v. Trumbull*, 16 Mich. 228.
2. The township board is given jurisdiction over the subject-matter

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of street improvements by the statute, it being necessary, however, before that jurisdiction is called into exercise in any particular case, that the property-holders set it in motion by filing a petition. In this case the board investigated the question as to sufficiency of the number of signers, and adjudicated and determined that the requisite number had signed, which determination is conclusive against all collateral attacks, and can only be reviewed in some direct proceeding to attack the same; citing *Stoddard v. Johnson*, 75 Ind. 20; *Montgomery v. Wasem*, 116 Id. 343; Elliott, Roads, 388.

C. H. Gleason, for defendant, contended for the doctrine stated in the opinion.

MORSE, J. This case arises from a proceeding in the circuit court for the county of Kent, in chancery, by the Auditor General, under the general tax laws, to obtain a decree for the sale of certain lands for the non-payment of a tax assessed thereon in the year 1887.

The lands are situated in the township of Grand Rapids, on what is known as "Fisher's Second Addition to the City of Grand Rapids," and upon the east side of East street, which street separates the city from the township. In 1887, the township and city authorities caused said East street to be graded and improved between Cherry street on the north, and Hall street on the south. This improvement was attempted to be made under Act No. 313, Local Acts of 1875, as amended by Act No. 353, Local Acts of 1877. Under these acts, the township board attempted to unite with the board of public works of the city for the joint improvement of this street, the center line of which is the boundary line between the city and township. In this case we have only to deal with the proceedings of the township board.

It appears that two petitions were presented to the township board for the grading of East street. The first one was filed with the township clerk, June 12, 1887. June 18, same year, the township board met, and this

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petition was laid on the table indefinitely. July 16, 1887, at another meeting of the board, it was resolved "that a new petition, with a majority of the resident property-holders, will be considered." July 23, 1887, a second petition was presented, and a motion made and carried that the petition be placed on file, and "that the prayer of the petitioners be granted." In the record of this meeting, the petition is set out in full, as is also the determination of the township board that a majority of the resident property-owners favored the proposed improvement. A resolution was also passed declaring the same a necessary public improvement. At a meeting held August 5, 1887, it was resolved that the petition be re-presented, and the action of July 23, 1887, was canceled, and so marked on the records of that meeting. August 22, 1887, a petition identical in words and signatures with the one of July 23, 1887, was received and filed by the township board. Acting upon this, the board determined that it was signed by a majority of the resident property-holders, and proceeded to make the improvement. The township board established a district deemed to be benefited by the proposed improvement, and upon which the cost thereof should be assessed, and let the contract under which the township's share of the work was done, and commissioners were appointed, who made an assessment roll containing the descriptions of the lands, the names of the owners thereof, and the tax assessed upon the same.

The defendant refused to pay the taxes assessed upon her lands for this improvement, and such lands were returned as delinquent, and included in the petition of the Auditor General in this proceeding, which was commenced by the filing of petition January 14, 1890. The defendant appeared and answered, filing her written

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objections to the validity of the tax. The court found that the assessment levied for the cost of this East-street improvement was invalid, on the ground that a majority of the resident property-holders, upon the portion of the said street so improved, had not petitioned for said improvment, and declared the proceedings void for want of jurisdiction. The petition of the Auditor General, so far as it related to the defendant's land, was dismissed. The Auditor General appeals to this Court.

The court below was right, and the petition, as against defendant, was properly dismissed. The first petition cannot be used to bolster up the proceedings which were had on the last petition. There were three names of resident property-holders on the first which were not on the last petition. But as the first petition was laid upon the table indefinitely, and never used in the proceedings, these three persons must be counted as not petitioning for the improvement. Only those who signed the petition acted upon, and which petition, from the records of the township board, appears as the beginning and basis of the proceedings had in the improvement, can be counted in favor of the same. The statute provides that the improvement is to be made "upon petition of a majority of the resident property-holders upon such highway or street." We are convinced from the testimony that the circuit judge was correct in his finding of fact that such majority was not obtained to the petition for improvement in this case. There were only 11 signatures to the last petition, and there was certainly the same number, if not more, of resident property-holders who did not sign it.

Three of the 11 names to the petition are challenged, to wit:

1. A. S. White, who lived with his four minor children upon lands owned by the children. He signed as guardian, but he had no power or authority to do so. His power

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over the real estate was limited to leasing it, and to the reception of rents and profits. *Kinney v. Harrett*, 46 Mich. 89. The statute authorizes the guardian, when licensed, under proper and stated proceedings, by the probate court, to sell or mortgage the real estate of his wards. But it is shown that the probate court did not authorize White to sign this petition, and we doubt if such court has the power to do so, as there is no statutory provision authorizing it.

2. James Dolbee, who signed as administrator. He also had no power or authority to bind the estate of which he was administrator. His signature cannot count.

3. George W. Thayer, Jr. Thayer and his wife were residents upon land which they held under contract which ran to them jointly. It is contended by defendant that his name cannot be counted, as he could not bind the property unless his wife joined with him; citing *Jacobs v. Miller*, 50 Mich. 124. The evidence shows that the contract ran to George W. Thayer, Jr., and Jessie Thayer; that Jessie Thayer was the wife of George W., and lived upon the property with him as his wife at the time of the signing of the petition. It is claimed by the State that, inasmuch as the land contract did not show upon its face that Jessie was the wife of George W. Thayer, Jr., and that fact must be shown outside of the deed and by oral evidence, their estate in the land was held as tenants in common. This is not the law. If the estate of *both* was created at the *same time* in *one* instrument, and they were at the time *in fact* husband and wife, their interest in the land was an entirety, and nothing that one could do would bind the other as to such interest. Therefore, under the manifest spirit and intent of the statute, the name of George W. Thayer, Jr., could not be counted as a resident property-holder unless his wife also signed the petition. The fact that they were

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husband and wife could be shown by oral testimony. *Dowling v. Salliotte*, 83 Mich. 131.

There were also upon lands fronting upon east street, and included in this improvement, two churches; one, the Holland Church property, was also occupied by a parsonage, in which the minister resided. In both churches the regular services and business meetings of the church societies were held. It is claimed that these two church societies must be regarded as resident property-holders, under the statute, and must be counted among those not signing. It is not necessary, for the purposes of this case, that this question shall be here determined; but we are of the opinion that the church corporations must be considered as resident property-holders.

It is contended by the counsel for the Auditor General that, the township board having determined upon investigation that a majority of the resident property-holders had signed the petition upon which such board acted, their finding and determination is final and conclusive againt all collateral attacks, and can only be reviewed in some direct proceeding. The statute does not provide that this determination of the township board shall be conclusive, and, in the absence of such a provision, the rule is well settled that the fact whether or not the requisite number of persons have signed a petition or given assent to pave or improve streets, when the power so to pave or improve them depends upon a given number or proportion of the proprietors to be affected, can be inquired into; and that the non-assent may be shown as a defense to an action to collect the assessment. See Dill. Mun. Corp. (3d ed.) § 800. See, also, *Twiss v. City of Port Huron*, 63 Mich. 528; *Mulligan v. Smith*, 59 Cal. 206; Cooley, Tax'n (2d ed.), 657.

There were other objections to the tax which we do not

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deem it necessary to notice. The want of jurisdiction, as above shown, defeats the tax.

The decree of the circuit court, as far as it affects the defendant, will be affirmed.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred with MORSE, J.

CAHILL, J. I concur in the result, but I adhere to the opinion expressed in *Dowling v. Salliotte*, 83 Mich. 131, that estates in entirety are abolished in this State by statute.

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FREDERICK W. CARLISLE v. THE CITY OF SAGINAW ET AL., AND JOHN L. SPAULDING v. SAME.

[Two cases.]

Constitutional law—Consolidation of the Saginaws—Officers de facto—Right of local self-government.

1. Act No. 455, Local Acts of 1889, consolidating the cities of East Saginaw and Saginaw into one municipality, to be known as the "City of Saginaw," provided that the aldermen of the two cities whose terms of office had not expired at the time of such consolidation should serve out their unexpired term in their respective wards, which were unchanged territorily. And it is held that said aldermen, while acting as aldermen of the city of Saginaw, are at least *de facto* such officers as they represent themselves to be, and that their acts are valid.
2. The Court decline to pass upon the question of the constitutionality of section 24, tit. 5, Act No. 455, Local Acts of 1889, authorizing the city of Saginaw to issue its bonds for the purpose of raising money with which to purchase a site and erect thereon a city hall in said city, and making it the duty of the common council to proceed immediately to procure such site, and construct said city hall within designated boundaries as to

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location, complainants not being in a position to raise such constitutional question.

Appeals from Saginaw. (Gage, J.) Argued November 13 and 14, 1890. Decided December 24, 1890.

Bills to restrain defendants from executing or negotiating certain bonds of the city of Saginaw. Complainants appeal from decrees sustaining demurrers to their bills. Decrees affirmed. The facts are stated in the opinion.

Eugene Wilbur (*Trask & Smith*, of counsel), for complainant Carlisle.

Camp & Brooks, for complainant Spaulding.

Lawson C. Holden (*Hanchett, Stark & Hanchett* and *W. L. Webber*, of counsel), for defendants.

CHAMPLIN, C. J. These two cases are identical in their facts, with the exception that the bills of complaint are filed by two different tax-payers of the city of Saginaw. They have been argued as one cause, and will be treated as but one case. This appeal is from a decree sustaining the demurrer of the defendants to the bill of complaint, and dismissing the bill for want of equity.

The case stated by the bill is that the complainant is a resident of the city of Saginaw, and the owner of real estate therein subject to taxation worth $10,000, and that the common council of the city, acting under the provisions of section 24 of title 5 of the charter of the city, being Act No. 455 of the Local Acts of 1889, on June 23, 1890, adopted a resolution for the issuing of the bonds of the city to the amount of $125,000, to be executed by the proper officers of the city, and to be sold and the proceeds thereof to be used for the purposes named in said section, viz., the purchase of a site for and the construction of a city hall;

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and that in pursuance of such resolution the officers of the city are preparing such bonds for execution, and will execute and deliver them to purchasers unless restrained by order of the court; and that the negotiation of such bonds would result in the taxation of the complainant's property. To prevent a cloud being cast upon his property by such taxation, he prays that the defendants be restrained from taking any further steps in the execution or negotiation of the bonds, and that the acts of the council be declared void. The bill alleges that the common council have taken no steps whatever to obtain an expression of the electors of said city as to their wishes and desires as to the issuing of said bonds and procuring a site for the construction of the city hall.

The reasons set forth in the bill of complaint why the proposed acts of the common council are illegal are as follows:

"Said common council have not submitted the question of issuing said bonds to the electors of said city, as required by section 13 of title 3 of said charter.

"That portion of the said charter under which said common council claim to act in issuing said bonds without the authority or sanction of said electors, viz., section 24 of title 5 of said charter, is illegal, null, and void, because the same is a violation of the constitutional rights of said city of Saginaw, in that it deprives said city of the right of local self-government.

"The issuing and negotiation of said bonds will render it necessary to raise upon the taxable property of said city, in addition to all other taxes, a sum sufficient to pay semi-annually the interst on said bonds, which taxation will at once begin, and an additional sum to pay the principal of said bonds as the same shall mature.

"Such taxation, being made, as it is by our laws, a lien upon real estate, will cast a cloud upon the title of your orator's real estate in said city that he is entitled to prevent by the aid of this court."

It is claimed in the brief filed in behalf of Spaulding

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that in the enactment of this section the Legislature of the State exceeded its constitutional powers,—

"1. In that it conferred upon 15 residents of the city all rights, powers, duties, and privileges of duly elected aldermen of the city of Saginaw, and created them a part of the common council of the city.

"2. That it fixed a site for a city hall for the city, and made it the duty of the common council of the city, created as in said charter provided, to purchase the site so fixed upon, and to erect a city hall thereon, thereby making it the duty of said common council to issue the bonds of the city to raise money to purchase the site and erect the hall."

We shall not again discuss the organization of the city government for the city of Saginaw. The 15 aldermen referred to are acting as the aldermen of the consolidated city, and they are at least *de facto* such officers as they represent themselves to be; and their acts, while acting in that capacity, will be valid. We shall not try their right to hold the offices in this collateral proceeding.

There can be no doubt that it is within the province of the Legislature to authorize the city of Saginaw to issue its bonds for the purposes of purchasing a site for the city hall, and erecting thereon a building for the purposes of the city. And it is equally without question that section 24 of title 5 of the charter authorizes, in express terms, the common council of the city to issue the bonds of the city for the purpose of raising money to purchase a site for and the construction of a city hall in said city. In this respect no right of local self-government is infringed.

But it is claimed that the Legislature had no authority to locate the site or to prescribe the boundaries within which the site should be located, nor to provide that all the offices of the city should be located and kept in such city hall when completed; and that, because the Legislature attempted so to prescribe the boundaries and the

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purposes for which the city hall shall be used when completed, the whole section is void, and that they have no authority under this section to issue the bonds of the city for the purposes stated; that the two are so blended together that they cannot be separated; that the city has no right or authority to issue bonds for the purpose of purchasing a site, unless it be the site within the district mentioned in the charter; and that the location of a site for its public buildings is within the exclusive control of the municipality. The main ground of contention on the part of the complainants is based upon that clause of the section in which it is made the duty of the common council to proceed immediately to procure such site, and construct such city hall within said boundaries. This, thay claim, is mandatory, and to carry it into effect makes it mandatory also to issue the bonds in question.

The proposition is doubtless true that for mere matters of local concern it is not competent for the Legislature to force a municipality to tax itself or to issue bonds, where the public interest is not concerned. It is, however, contended that, the authority being fully granted by this section to issue the bonds, if the portion making it the duty of the common council to proceed immediately would be an infringement on the constitutional right of local self-government, yet that part granting the authority may stand, and the portion which is objectionable, on account of being opposed to the Constitution, will be null and void, and the council will be at liberty to proceed to issue the bonds under this section, and to purchase a site, under the discretion vested in them by the charter. But we think that the constitutional question is not presented by the bill of complaint in such shape as to call for any decision as to the validity of any portion of the section.

It does not appear that the Legislature has compelled

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the common council to proceed to issue the bonds complained of. It granted them full authority to do so, and they have acted, and are about to act, in the exercise of the authority granted. There is no compulsion over their action by the Legislature. It cannot be presumed that they were influenced to violate the Constitution. If the clause making it their duty to proceed immediately to select the site would be a violation of the Constitution, we should expect that they would wait to be compelled to act, and not voluntarily act in violation of that instrument. The whole subject-matter of raising these bonds is by the statute placed in the control of the representatives of the municipality, in consonance with the principles of local self-government. No one is coercing them, and if they do not see fit to place themselves in a position to raise the question of the constitutionality of the portion of the section referred to, a third person, not representing the municipality, cannot do so.

It not being necessary for us, in the view we take of the case, to pass upon the question of the constitutionality of this section of the charter, we decline to do so. We do not say that the provision making it mandatory upon the council to select a site in a particular portion of the city is a constitutional exercise of legislative power; neither do we deny that it is such. Whether it is such or not, the complainants in these bills are not in position to raise the question, and the decrees of the circuit court must be affirmed.

The other Justices concurred.

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WILLIAM P. SPALDING v. WILLIAM CHANDLER.

Public lands—Pre-emption—Indian reservation.

1. The Indian reserve at Sault Ste. Marie was not subject to pre-emption under the pre-emption law of 1841, even after the surrender by the Chippewa Indians to the United States, August 2, 1855, of the rights secured to them therein under the treaty of June 16, 1820; the government having seen fit to exempt Indian reservations from the provisions of said pre-emption act, even after the Indian title was extinguished.
2. The rights secured to the Chippewa Indians under the treaty of June 16, 1820, in the Indian reserve at Sault Ste. Marie, was a *perpetual* one, and when said reserve was set apart and appropriated to their use for a place of encampment, the land could not be thereafter used or occupied by any one else while they accepted and used it, and all of the beneficial attributes and belongings of the fee were theirs, as far as any use of the same was concerned.
3. The fact that a parcel of land embraced within the Indian reserve at Sault Ste. Marie was at one time within the so-called "Military Reservation," or at least surrounded by it, did not alter its character, or take away or destroy the right of the Indians to its use for the purposes for which it was set apart and reserved; nor could Congress by naming the land as a "military reservation" in the act of Congress of August 26, 1852, granting the right of way to the State of Michigan for the canal at Sault Ste. Marie, or by any other legislation, directly or indirectly, destroy the reservation after it had been set apart to and used by the Indians under the treaty of 1820; the voluntary cession of the land to the United States by the Indians themselves being necessary to deprive it of its character as an Indian reservation. *Railroad Co. v. U. S.*, 92 U. S. 733, 742.

Appeal from Chippewa. (Grant, J.) Argued November 11 and 12, 1890. Decided December 24, 1890.

Bill to declare the title to a portion of the Indian reserve at Sault Ste. Marie, patented to the defendant, to

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belong to complainant under a prior pre-emption under the pre-emption law of 1841. Complainant appeals from a decree dismissing his bill. Decree affirmed. The facts are stated in the opinion.

Lawrence F. Bedford (Brennan & Donnelly, of counsel), for complainant.

John H. Goff, for defendant.

MORSE, J. This controversy involves the title to a parcel of land near Sault Ste. Marie, in this State, a part of what was once termed the "Indian Reserve."

The complainant claims title under a pre-emption entry of one Byron B. Adsit. The proofs show that Adsit moved upon the land in 1856 or 1857, and built a house upon it, and raised some garden vegetables. He proved up his claim before the register and receiver of the land-office at Marquette, and December 5, 1859, received from these officers a certificate describing the land covered by his entry as follows:

"Lot designated on the map of the United States survey in the land-office at Marquette, Mich., as 'Indian Reserve,' subject to all the provisions, requirements, and conditions of an act of Congress entitled 'An act granting to the State of Michigan the right of way, and a donation of public lands, for the construction of a ship-canal around the falls of the Ste. Marie, in said State,' approved August 26, 1852, of section No. six, in township No. 47 north, of range No. 1 east, containing 36 50-100 acres, at the rate of $1.25 per acre."

This certificate stated that, in pursuance of law, Adsit had, on that day, purchased the above described premises, and would be entitled to a patent for the same upon his presentation of such certificate to the General Land-office at Washington. He was also given a receipt for the money paid therefor. On the same day, the local land-officers at Marquette wrote the Commissioner of the

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General Land-office, stating that they had examined Adsit's proofs of his pre-emption claim—

"To what is designated 'Indian Reserve' in section six, township 47 north, of range one east, containing 36 50-100 acres, and find that the same was originally reserved for Indian purposes; that it was surveyed in 1845, and the contents ascertained, as appears by our maps; that the Indian claim and title was extinguished by the treaty of August 2, 1855, for reference to which, see 'Statutes at Large and Treaties of the United States of America, commencing with the first, session of the 34th Congress, 1855 and 1856,' page 37 of treaties, and which has since been complied with by the United States by payment to the Indians."

They recommended the allowance of Adsit's claim, considering the land subject to pre-emption and his proofs sufficient. To this letter, the acting Commissioner, John S. Wilson, replied of date February 8, 1860, referring the Marquette officers to his instructions of June 9, 1853, in which they were informed that section 6, among other lands, was within the military reservation of Ft. Brady. They answered, and called the attention of the Commissioner to the act of Congress of September 26, 1850, stating that, under such act, the military reserve had been reduced to about 40 acres, and did not include the lands in question, and referring him also to the map of private claims to be found in his office; and further stating that they knew of no reason why the land was not subject to pre-emption. April 9, 1860, Wilson again wrote them that, the land claimed by Adsit not being subject to pre-emption, his entry was canceled, and directing them to note such cancellation on their books and plats, and to notify Adsit to make the usual application for the repayment to him of his purchase money. No further effort was made by Adsit, or any one in his behalf, to obtain a patent upon his certificate, and no appeal was taken from the action of the Commissioner.

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August 7, 1860, Adsit conveyed the land by quitclaim deed to the complainant.

The defendant claims title under a patent from the United States, dated December 15, 1883, issued to him, describing about 9.10¾ acres, which land is admitted to be within the limits of Adsit's pre-emption entry.

The complainant filed this bill November 22, 1888, asking that the title to the land described in said patent be decreed to be his by the prior and paramount right of his pre-emption, and that Chandler be directed to make a proper conveyance of the fee to him. It is admitted that the fee remained in the United States up to the issuing of the patent to Chandler, subject to the the pre-emption right of complainant. The circuit judge, Hon. C. B. Grant, sitting in the circuit court for the county of Chippewa, dismissed the complainant's bill upon the proofs, from which decree the complainant appeals.

The only right the complainant has is based upon the pre-emption of Adsit, and neither he nor the Court is concerned with the title of Chandler, as complainant had no possession of the premises when Chandler entered under his patent and occupied the land.

Several reasons are urged in this Court why the land in question was not subject to pre-emption at the time Adsit made his entry, and proved his claim before the local land-officers.

First. It is claimed that it was an Indian reserve, and, under the pre-emption law of 1841, by virtue of which Adsit made his entry, could not be pre-empted. Section 10 of said law of 1841, providing for the pre-emption of lands, contains the following provision:

"No lands reserved for the support of schools; nor the lands acquired by either of the two last treaties with the Miami tribe of Indians, in the state of Indiana, or which

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may be acquired of the Wyandotte tribe of Indians, in the state of Ohio, *or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act;* no sections of land reserved to the United States alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement; no sections, or fractions of sections, included within the limits of any incorporated town; no portions of the public lands which have been selected as the site for a city or town; no parcel or lot of land actually settled and occupied for the purposes of trade, and not agriculture; and no lands on which are situated any known salines or mines,—shall be liable to entry under and by virtue of the provisions of this act." 5 U. S. Stat. 456.

The undisputed history of this so-called "Indian Reserve," at Sault Ste. Marie, of which this land was unquestionably a part, is as follows: June 16 1820, the Chippewa Indians ceded to the United States 16 square miles of land, designated by metes and bounds, reserving, however, rights of fishing and encampment, which were guaranteed to them as follows:

"The United States will secure to the Indians a perpetual right of fishing at the fall of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground, which place shall not interfere with the defenses of any military work which may be erected, nor with any private rights." 7 U. S. Stat. 206.

March 28, 1836, the Ottawa and Chippewa Nations ceded to the United States a large tract of country, including within its limits the 16 square miles above mentioned. By article 3 of this treaty, the rights of the Indians were preserved in the following words:

"It is understood that the reservation for a place of fishing and encampment, made under the treaty of St. Mary's, of the 16th of June, 1820, remains unaffected by this treaty." 7 U. S. Stat. 492.

July 31, 1855, the said tribes released and discharged

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the United States from all its obligations and liabilities under former treaties, and, in lieu thereof, accepted other grants and payments, exempting, however, from such relinquishments, the right of fishing and camping secured to them by the treaty of 1820. 11 U. S. Stat. 624.

August 2, 1855, the said Chippewa Indians of Sault Ste. Marie relinquished to the United States, for a valuable consideration, all their interests in this land, as follows:

"The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's, and of encampment convenient to the fishing ground, secured to them by the treaty of June 16, 1820." 11 U. S. Stat. 631.

The land claimed by Adsit under his pre-emption was surveyed by the United States as a reservation for the Indians, and for a long time was treated as such, and Indians resided thereon in wigwams and log-houses until removed by the government. There is no doubt that this tract was set apart for the use of the Indians, and was used and occupied by the Chippewa Indians for encampment, under the reservation of 1820.

But it is claimed by the counsel for the complainant that, under the act of Congress of August 26, 1852, granting the right of way to the State of Michigan for the canal at Sault Ste. Marie, this land is termed and treated as a "Military Reserve" (see 1 Land Laws U. S. 1882, p. 218), and that under the act for settling claims at the Sault Ste. Marie, passed in September, 1850, the military reserve was reduced to its present limits; that it is apparent from the act of August 26, 1852, that, while this tract of 36 50-100 acres was devoted to the use of the Indians for fishing and camping, the appropriation of the land for such purposes was but a

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temporary one, and the land was not regarded by the government as an Indian reserve, as contemplated by the pre-emption law of 1841, but as a military reserve in connection with the uses of Ft. Brady; that, therefore, the land was subject to Adsit's entry.

But the right given to these Indians by the treaty of 1820 was a "perpetual" one. There could be no stronger reservation. While the fee may have been vested in the United States of the whole of the 16 miles square, when this so-called "Indian Reserve" was set apart and appropriated to the use of these Indians for a place of encampment, the land certainly could not be used and occupied by any one else while they accepted and used it, and all the beneficial attributes and belongings of the fee were theirs, as far as any use of the same was concerned. And. after it was so set apart by the government, and accepted and occupied by the Indians, it is very doubtful if the United States could have changed the location of this reservation to some other point, without their consent. To have done so would have been a great moral wrong which only the doctrine that might makes right could have justified. But this was not attempted, and it remained such Indian reservation until it was relinquished by the apparently voluntary act of the Indians themselves. It cannot readily be seen that it differed in any material respect from other Indian reservations, except in this: that it was not in any sense lands that might be made available for agricultural purposes.

It is undoubtedly true that this reservation was included in the lands through which a right of way was granted by the act of August 26, 1852, but the only reference in the act to it is as to the whole grant, which speaks of "the public lands known as the 'Military Reservation of the Falls at St. Mary's River.'" This particular piece was at

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one time within the so-called "Military Reservation," or at least surrounded by it, but this did not alter its character, or take away or destroy the Indian reservation, or the rights of the Indians to its use for the purposes for which it was set apart and reserved in the first place. And Congress by naming these lands as a "military reservation" in the act of August 26, 1852, or by any other legislation, directly or indirectly, could not destroy this Indian reservation, after it had been set apart to the Indians, and used by them, under the treaty of 1820. This piece of land could only be taken away from them, and deprived of its character as an Indian reservation, by its voluntary cession to the United States by the Indians themselves. *Railroad Co. v. U. S.*, 92 U. S. 733, 742, and cases cited.

The reason for the exemption of these lands, after the Indian title is extinguished, from pre-emption, is a good and substantial one, and in accord with the best public policy. The pre-emption law was a beneficent one, but it was not enacted for purposes of speculation, but to encourage actual and *bona fide* settlements upon the public lands. The reason is well stated by Mr. Justice Miller of the Supreme Court of the United States in *Root v. Shields*, 1 Woolw. at page 362, in speaking of the exemption from pre-emption of sections and fractions of sections included within the limits of any incorporated town:

"Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. * * * So, too, in respect of lands which have been reserved for the use of an Indian tribe when the Indian title is extinguished, the same may be said. While such lands are held as a reserve, population flows up to their boundaries, and is there stayed. It, of course, constantly grows more and

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more dense, so that, when the reserve is vacated, the lands have increased in value, and are always eagerly sought after."

It would, no doubt, under such circumstances, not be in the interest of the government, or of the whole people, to permit the pre-emption of these lands; nor yet the location of them by scrip, as was done by Chandler in this case. But, as before said, there need be no inquiry into Chandler's title here, if complainant's is not good. The government saw fit, in the pre-emption act of 1841, to exempt Indian reservations, even after the Indian title was extinguished, from the provisions of the act. If this land was not appropriated as an Indian reserve, under the treaty of 1820, at the time of the passage of the pre-emption law of 1841, it was certainly surveyed out and set apart as such as early as 1845, and it was, no doubt, used and treated as such before that time. But the act of 1841 covers all Indian reserves, whether set apart and designated as such before or after the passage of the act. It follows that Adsit could not pre-empt the land, and the complainant has no title to the premises.

The decree of the court below is affirmed, with costs.

CHAMPLIN, C. J., CAHILL and LONG, JJ., concurred. GRANT, J., did not sit.

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MAUD BLAISDELL, BY HER NEXT FRIEND, v. JOHN SCALLY.

[See 83 Mich. 357.]

Replevin—Res judicata—Trover and conversion—Damages—Error without prejudice.

1. A father and mother included in a mortgage of their household goods a piano belonging to an infant daughter, and it was replevied from them by the mortgagee. On the day the writ was delivered to the officer the daughter took out a writ of replevin for the piano from justice's court, after which the officer removed it from her parents' house, claiming to have levied his writ upon it on the day it was placed in his hands. Such proceedings were thereafter had as resulted in a judgment in favor of the father and mother, and also in favor of the daughter, but the piano remained in the possession of the mortgagee, to whom it had been delivered by the officer. After recovering said judgment the daughter sued the officer for the value of the piano, and for damages she had sustained by reason of its removal, in which suit the officer claimed that the judgment in the replevin suit was a bar to the second suit. And it is held that the removal of the piano after the commencement of the replevin suit was a new and independent taking, and that that suit had no connection with the second one that would make the judgment rendered therein a bar to the second suit.
2. In such a case the daughter could only recover the value of the piano, with interest; but a judgment in her favor not exceeding the sum at which it was valued by the appraisers in the replevin suit against her parents, and for less than its value as testified to by her witnesses, is not reversed for the error of the court in instructing the jury as to the measure of damages.

Error to Kent. (Burch, J.) Submitted on briefs November 14, 1890. Decided December 24, 1890.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

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Maher & Felker, for appellant.

Frank G. Holmes, for plaintiff.

MORSE, J. This is an action of trespass on the case for the taking of a piano, claimed to belong to plaintiff. The piano is one of the articles mentioned in a certain mortgage, which was found to have been wholly paid and satisfied in the case of *Bateman v. Blaisdell*, 83 Mich. 357[1]. The defendant is a deputy-sheriff of Kent county, and, at the time of the commencement of this suit, had possession of the piano, under the writ of replevin in that case. On the trial of the case at bar, the jury returned a verdict in favor of plaintiff for $200.

There is a dispute as to when Scally took possession of the piano under his writ. The writ came into his hands on February 28, 1889, but he did not remove the piano from the house of the plaintiff's parents until March 2, 1889. He went to the house with his writ for the purpose of executing it on the day it was issued. He was then informed that the piano belonged to Maud, and he must not take it. Scally claims he then levied upon it, but others testify that he did not levy on February 28, but said he was not going to take the piano, and kept on saying so, until March 2, when he removed it by force. The piano was delivered over to Bateman, who has ever since had the practical possession of it.

On February 28, 1889, this plaintiff, by her next friend, Benjamin S. Harris, commenced a replevin suit against Loomis K. Bishop, sheriff of Kent county, for the recovery of the possession of this same piano, before Thomas Walsh, a justice of the peace in and for the city of Grand Rapids, which suit was made returnable

[1] This mortgage was given by the plaintiff's father and mother, and covered certain household goods, as well as the piano; and for a full statement of facts in this regard, see 83 Mich. 357.

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March 11, 1889. On that day, defendant moved to dismiss the suit. The motion was denied, and the cause adjourned until March 18, 1889, at which time defendant pleaded. The cause, on defendant's motion, was adjourned again until March 25, 1889, at 9 o'clock A. M. On the last-named day and hour, the plaintiff appeared. Defendant did not appear. After waiting one hour, trial proceeded, and judgment was rendered in favor of the plaintiff, and the damages of the unlawful detention were assessed at 6 cents. The costs were taxed at $8.48. The damages and costs were paid April 1, 1889, and the justice made the following entry on the docket: "This judgment satisfied and discharged, April 1, 1889."

It is claimed by defendant's counsel that this judgment is a complete bar to the plaintiff's action here. This present suit was commenced April 8, 1889. The undisputed evidence in this case is that the piano was not removed from the possession of the plaintiff until March 2, 1889, and we are satisfied that, under any view of the case, this was a new and independent taking, after the commencement of the suit before Justice Walsh, and that, therefore, that suit has no connection with the present one that would make the Walsh judgment a bar to this action.

In the light of the affirmance of this Court of the judgment of the Kent circuit court in the case of *Bateman v. Blaisdell*, the taking by Scally of this piano, under the writ in that case, was an unlawful one in any event. And, if it belonged to the plaintiff in this suit, his taking it from the house, and from her possession, was unlawful, whether he actually levied upon it before or after the suit was commenced before Justice Walsh.

It is objected that testimony was permitted to be introduced that plaintiff had not had the use of the piano since it was taken out of the house. Defendant's coun-

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sel objected to any testimony as to the loss of the use of the piano after the suit was brought, April 8, 1889. The court said:

"I will take the testimony subject to the objection, and cover it with the charge, and, if I come to the conclusion that it is not admissible, will strike it out on motion of counsel."

In his instructions, he directed the jury to find no damages for any loss of the use of the piano after April 8, 1889. We find no prejudicial error in this action of the court.

There are other assignments of error as to the admission of testimony, but none of them are found to be worthy of discussion.

The declaration contained three counts, the last one being a count in the common form of a count in trover. The other two alleged special damages, by reason of the loss of the use of the piano, in that she was preparing herself, by daily study and practice upon the same, for the profession of a teacher of music, and was, by the taking of the same, greatly hindered and unjustly prevented from carrying on and pursuing her said study and practice, depriving her of the gains and advantages of said study and practice, to her damage; and also by reason of the taking of said instrument by force, and by threats of arrest and imprisonment, if she resisted, or in any way hindered, him from taking the same, he illegally and wrongfully converted the said piano to his own use, depriving her of all further use of the same, and of the opportunity of further pursuing her said study and practice of music.

It is argued by defendant's counsel that, under this declaration, the plaintiff was only entitled to the value of the instrument, and interest upon such value from the day of its taking, which are the usual damages in an

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action of trover. We are not enabled from the record to find whether or not the jury allowed any other damages than the value of the piano, and interest upon the same, as there was competent testimony showing its value at the time of the taking to be more than the amount of the verdict. The testimony on the part of the plaintiff was that the piano, at the time it was taken, was worth from $250 to $300. The evidence upon the part of the defendant was that the instrument about two weeks before the trial was worth $50. It was also shown that, in the replevin suit of *Bateman v. Blaisdell*, under which writ defendant took it, the piano was valued at $250. The plaintiff was only entitled to the value of the piano, and interest upon it. It does not appear to us that she recovered any more than that, and, under the circumstances, considering that Scally removed this piano by force, and without right, after he knew that plaintiff had replevied it from the sheriff, under whom he was acting, and no effort was made by him to have it returned to her after the judgment in favor of her possession in justice's court, we shall not reverse the judgment for the error in the instruction of the court as to her damages on account of the loss of the use of it.

The judgment is affirmed, with costs.

The other Justices concurred.

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THE COMMISSIONERS OF PARKS AND BOULEVARDS OF THE CITY OF DETROIT v. PETER RUSH, COMPTROLLER OF THE CITY OF DETROIT.

Municipal corporations—Detroit city charter—Park and boulevard bonds—Approval of board of estimates.

The issuance of bonds by the common council of the city of Detroit to raise money to pay for lands purchased or condemned by the commissioners of parks and boulevards under section 15 of Act No. 388, Local Acts of 1889, need not be approved of by the board of estimates of the city, established by Act No. 488, Local Acts of 1887.

Mandamus. Submitted November 18, 1890. Granted December 24, 1890.

Relators applied for *mandamus* to compel respondent to advertise for proposals for certain park and boulevard bonds. The facts are stated in the opinion.

John J. Speed, for relators.

Charles W. Casgrain, for respondent.

CHAMPLIN, C. J. By Act No. 388, Local Acts of 1889, the commissioners of parks and boulevards of Detroit were created; the act providing that such commissioners should be appointed by the mayor with the consent of the common council of the city of Detroit. By section 15 of this act, the commissioners were authorized, with the approval of the common council, to enter into contracts for the purchase and conveyance to the city of lands, or, with the consent of the common council, they might acquire lands by the legal proceedings provided for in the act. In pursuance of this section, the

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common council of the city of Detroit, on April 23, 1890, adopted the following resolution:

"*Resolved*, that the commissioners of parks and boulevards be and are hereby authorized to enter into contracts with the owners of lands lying within the route of the boulevard, for the purchase of the same, subject to the approval of the common council; and if said commissioners shall, in any cases, be unable to make favorable contract or contracts, then said commissioners be authorized to cause to be instituted the necessary proceedings to condemn the lands for right of way in such cases."

Being unable to make favorable contracts with certain parties, the commissioners took the necessary proceedings to acquire the lands by condemnation for the right of way of the boulevard, and obtained an award in favor of the improvement, and fixing the amount of damages, including the expenses, at $3,491. The verdict of the jury being confirmed, the commissioners reported their proceedings to the common council, and requested that funds be provided for the payment of the amount awarded and expenses. This communication was referred to a committee, who reported to the common council that the contingent fund was exhausted, and it was necessary to issue bonds, and accompanied their report with a resolution as follows:

"*Resolved*, that in order to raise the necessary funds to pay the amounts awarded by the jury in certain proceedings taken in the recorder's court to condemn certain lands of Fredericka Kuehle and Margaret Klein, together with the costs, the comptroller be, and he is hereby, directed to advertise for five days for proposals for $3,500 of park and boulevard bonds, the same to bear interest at four per cent., to be of $500 each, and payable in 20 years."

The resolution was adopted by the council, and the same was approved by the mayor. The city comptroller now refuses to advertise for proposals, claiming that, before the bonds can lawfully be issued, the consent of

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the board of estimates of said city must be obtained. The commissioners applied to this Court for a *mandamus* to compel him to advertise, as required, and this Court granted an order upon him to show cause, to which he has made the following response:

"He admits that said relators have applied to him requesting him to advertise for proposals for the purchase of said bonds mentioned in the petition and order to show cause herein; but that respondent has refused to advertise, as requested, because said issue of bonds was not submitted to, or authorized by, the board of estimates of the city of Detroit, as required by law."

Section 15 of the act mentioned, after providing for conferring authority upon the commissioners, with the consent of the council, to contract for the purchase, or, failing in that, for the condemnation, of lands, continues as follows:

"And, upon such acquisitions being made, to cause the proper conveyances to be made and recorded; and the purchase price thereof, as well as for any compensation to be paid for any lands which may be taken or condemned by proceedings taken therefor, as hereinafter provided, may be paid from the contingent fund of said city, or may be raised, if the common council shall so determine, by the issue of bonds, to be known as 'park and boulevard bonds,' and which shall be signed, numbered, recorded, sold, and issued in like manner as Detroit sewer bonds are, by the city charter, required and authorized to be made and issued; and the moneys so paid or raised shall be exclusive of the amounts raised for maintenance and improvement, as hereinbefore provided."

The objection of the comptroller that the issue of these bonds was not authorized by the board of estimates is based upon an act of the Legislature passed in 1887 (Act No. 488, Local Acts of 1887), establishing the board of estimates, and, among other things, providing as follows:

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Chapter 8, § 1. "Before any taxes shall be levied for the purposes or any of the funds into which the revenues and moneys of the city may be divided, the comptroller shall present to the common council, in writing, his estimates of the amount of taxes which, in his opinion, it may be necessary to raise for the ensuing year, for the purpose [purposes] of each of said funds; and also an estimate of the entire proposed expenditures for said year, whether the same is to be raised by tax, by loan, or by special assessment, which estimates shall be published in the official paper of the city. The comptroller shall, at the same time, give to the common council any information in his power or which they may request concerning the finances of said city. The common council may revise or alter said estimates, but not so as to exceed the aggregate taxes authorized by law to be levied, and, when such estimates shall be finally adopted by them, the same shall be transmitted by the clerk of said board to the board of estimates. The common council shall so alter, revise, and adopt said estimates on or before the fifth day of April in each year."

"SEC. 4. Before any moneys shall be raised, or taxes levied and collected, for the purposes of the several funds mentioned in the charter of the city of Detroit, and acts amendatory thereof, except interest and sinking funds for the purpose for which moneys are required to be raised by other acts relating to said city, which require estimates for taxes to be submitted by the city comptroller or other officers and boards, the estimates of the amount of moneys required for such funds or purposes by tax shall be submitted to said board of estimates, and, before any bonds shall be issued, said issue shall be authorized by said board of estimates. The estimates for the general city taxes shall be acted upon by the common council, as provided by law, and shall be submitted to said board of estimates in time to be considered by the board on or prior to said 5th day of April. Said board shall carefully consider all estimates hereby required by this act to be submitted to it of moneys to be raised as aforesaid, and shall approve or disapprove of the same. It may decrease the amount to be raised, but shall not increase the same. It may authorize the issuing of bonds in the same manner, and in the same cases, as such citizens' meetings might authorize the same. A majority of all the members elect of said board shall be required to approve of

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any such estimates for the raising of taxes, or any part thereof, or to authorize the issue of any bonds.

"SEC. 5. All votes in said board, approving or disapproving of any estimate, or decreasing the amount thereof, or authorizing or disapproving of the issue of bonds, shall be taken by yeas and nays, and entered upon the record of its proceedings. After said board shall have considered the said matters required to be submitted to it, it shall cause a statement of the amounts, so approved by it, to be raised by taxation or issue of bonds, and the fund or purpose for which raised, to be made, which statement, being adopted by a majority of all the members elect of the board, shall be then certified by the president and secretary of the board, and shall be transmitted to the common council, and only so much of such estimates or amount to be raised by taxation as shall have been approved by the said board shall be raised and collected in said city; and only such bonds shall be issued as shall be authorized by said board, as herein provided. The common council of said city, upon approval of said estimates, or any part thereof, by said board, shall cause to be levied and collected by general tax the amount thereof so approved, and shall issue any bond so authorized to be issued by said board, as aforesaid."

It is insisted that, in virtue of these sections pertaining to the board of estimates, and by the language of the fifteenth section of Act No. 388, Local Acts of 1889, providing that the bonds shall be signed, numbered, recorded, sold, and issued in like manner as Detroit sewer bonds are, by the city charter, required and authorized to be made and issued, these bonds, authorized by the common council, must first be passed upon by the board of estimates before they can be issued.

The provisions of the statute pertaining to the board of estimates are a part of the charter of the city of Detroit; so, likewise, is Act No. 388 an act supplemental to the charter of the city of Detroit; and they must be construed together as one act, and the sole question is whether or not, in cases arising under section 15 of Act No. 388, the board of estimates must pass upon the issu-

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ing of the bonds before the comptroller of the city can place them upon the market. It is implied in this position that it rests with the board of estimates to veto the action of the common council, and what has been done by the board of commissioners of parks and boulevards; and that, although they may have contracted for the purchase of lands under the authority conferred by section 15, yet they cannot perfect such purchase by payment of the contract price, and thus acquire the lands to the public use, without the consent first obtained of the board of estimates, for, if the consent of the board of estimates is required to the issue of the bonds, it is likewise required to the binding effect of a contract of purchase, since it must be paid from the tax levy.

It is claimed on the part of counsel for respondent that the universal custom since 1802, when the town of Detroit was incorporated, has been to submit every item of expenditure to a meeting of citizens for discussion and approval, and that that custom has been preserved through different bodies, who have taken the place of the citizens' meeting; that therefore it is the design of the statute still to require every item of expenditure to be passed upon by some authority which represents the citizens' meeting of the early days of the municipality. It is true that this check upon the expenditure of money has been preserved in the legislation concerning the city of Detroit. It is doubtless, however, competent for the Legislature to provide that certain expenditures may be made upon approval of the common council, and it is competent also for them to abolish entirely the board of estimates, which has come now to represent the citizens' meeting. And the question is whether, in construing this statute in connection with that which relates to the board of estimates, it was the intention to permit expenditures of this kind to become binding obligations on the city on

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the approval thereof by the common council of the city, and without the approval of the board of estimates.

We do not think that the requirement that these bonds shall be signed, numbered, recorded, etc., in like manner as Detroit sewer bonds are required to be, makes it necessary that they shall, before being signed, numbered, and recorded, receive the approval of the board of estimates. It seems to us that the express direction given as to how they shall be signed, numbered, recorded, and issued, impliedly excludes the idea that they were to be first approved by the board of estimates. The object of this provision appears to be to require their date and number in the order of their issue, and the amounts, to be kept by the comptroller, in order that it may be known how much indebtedness there is outstanding against the city for this purpose, so that provision may be made for its payment.

We must construe the several provisions of the charter of the city of Detroit so that they may be harmonious, if possible. The statute has vested in these commissioners of parks and boulevards certain discretionary powers, among which are to purchase or otherwise obtain land for the purpose of the boulevard, and, in case they cannot obtain the same by private negotiations, to apply to the proper court to condemn the same for the public use. When this step is taken, a jury must, under the statute, pass upon the necessity for taking the land for the public use, and determine and award the just damages and compensation to be made therefor. And the statute requires that such damages and compensation, after having been ascertained in the manner provided by the act, shall, within one year after the confirmation of the verdict of the jury, or after it is affirmed on appeal, be paid by the commissioners or tendered to the respective persons entitled to receive the same; and it further provides that,

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upon such tender of compensation being made, the title of the property will vest in the city of Detroit for the public use. Now, if we should say that this compensation cannot be paid to these parties unless it shall first be passed upon and approved by the board of estimates, it would be placing it in the power of this board to defeat the verdict of the jury to the effect that the taking of the lands was a necessary public improvement, and also to defeat the purchase of lands for that purpose. Unless the board of estimates has this power, it would be a useless form to present the question to them whether they will approve of the issuing of the bonds or not; and, since it was the design of the statute that the lands should be purchased or condemned and paid for as provided in the act, we think it is not necessary that they should approve of these bonds before they are issued.

Mandamus must, therefore, be granted.

The other Justices concurred.

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THOMAS GRISTOCK v. THE ROYAL INSURANCE COMPANY.

Fire insurance—Proofs of loss—Waiver—Incumbrances—Notice to agent—Authority of adjuster—Evidence.

1. An insurance adjuster and the agent of the assured spent several days investigating the loss, during which time a list of the personal property destroyed was made, signed, and sworn to by the agent, and an agreement arrived at as to the value of all of the buildings except the dwelling-house, which question was agreed to be submitted to arbitrators, with whom the adjuster and agent were to meet in five days, and close the matter up; but before the time arrived for such meeting the

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adjuster wrote that he could not meet at the time appointed, and the agent, relying upon this, did not make out the formal proofs of loss as required by the policy. Shortly after the expiration of time limited in the policy for making such proofs, the adjuster inquired of the agent if they had been sent to the company, and was informed that the agent supposed that the proofs had been already made out except as to the house, and as to that he had been waiting on the motion of the adjuster. Soon after this interview the agent informed the company by letter of what had occurred between him and the adjuster, and asked for a speedy adjustment of the loss, and was notified by the general agents of the company that the adjuster denied the statements contained in the agent's letter, and that they were advised by their counsel that the policy was null and void. In a suit to recover the insurance, in which the foregoing facts were testified to by plaintiff's witnesses, the court instructed the jury that if the conduct and acts and conversation of the adjuster would induce an honest belief on the part of the agent that the proofs that were being made, and certificates (of value) that were being furnished, and the negotiations that were being had, were all that were required by the company, and that the agent acted with an honest belief of such fact, which he was warranted from the facts in entertaining, as a reasonable man, the jury would be justified in finding a waiver by the company of formal proofs of loss; which charge is held to be sustained by the authorities; citing *Insurance Co. v. Fay*, 22 Mich. 467; *Insurance Co. v. O'Connor*, 29 Id. 241; *Insurance Co. v. Kranich*, 36 Id. 289; *O'Brien v. Insurance Co.*, 52 Id. 131.

2. An applicant for insurance informed an agent authorized to issue policies, on making an *oral* application for insurance, that there were certain mortgages on the property, and was informed by the agent that it was all right. The policy was issued, and in reporting to the company the agent stated that the property was not mortgaged. The policy provided that, if the property was or should be mortgaged without written notice by the assured to and the written consent of the company indorsed on his policy, it should be void. It also provided that agents had no authority to bind the company except strictly in accordance with the terms, conditions, limitations, requirements, and the actual issue of the policy, and that their acts, statements, or knowledge should not be held or claimed to have waived any of the conditions or stipulations of the policy, unless waiver was indorsed thereon in writing, signed by such agent. In a suit to recover the insurance the court

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instructed the jury that if they should find that, prior to the issuance of the policy, explicit, definite notice of the character and amount of the mortgages was given to the agent, so that with full knowledge of such incumbrances he issued and delivered the policy, and then failed to notify the company of the fact, the plaintiff would not be precluded from recovery, as the jury might treat the knowledge of the agent that of the company; which instruction is held to have been correct, within the former decisions of the Court; citing *O'Brien v. Insurance Co.*, 52 Mich. 181; *Copeland v. Insurance Co.*, 77 Id. 554; *Russell v. Insurance Co.*, 80 Id. 407.

3. The negotiations and agreement for arbitration set forth in head-note 1 were within the general authority of an insurance adjuster, and, in the absence of notice to the assured of a more limited authority, he had a right to rely upon such general authority, and act accordingly.

4. Two sworn statements were made out by the agent of the assured, one of the personal property lost by the assured, and the other of that of the agent, both of which were introduced in evidence in a suit by the assured upon his policy. The agent testified on cross-examination that some of the articles listed in the statement of his loss belonged to the assured, and on redirect examination he testified that he never intended to state that he owned said articles. And it is held that the witness was entitled to testify to the mistake, and, as in so doing he would indirectly testify to his intention in making the list, no error was committed in refusing to strike out the testimony.

Error to Clinton. (Edget, J., presiding.) Argued November 21, 1890. Decided December 24, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Norris & Norris, for appellant.

Spaulding & Walbridge and *Griswold & High,* for plaintiff.

GRANT, J. The plaintiff's buildings, consisting of one two-story frame dwelling-house and two barns, and the hay, grain, and farming implements therein, were insured with the defendant. They were destroyed by fire October

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17, 1888. The policy required proofs of loss to be submitted within 30 days after the loss occurred. No such proofs were made. Plaintiff commenced suit August 20, 1889. The case was regularly brought to trial, and plaintiff recovered verdict and judgment.

1. Plaintiff admits a failure to submit proofs of loss, but claims that they were waived. One Faxon was the local agent of the company in securing the policy. Immediately after the fire, Faxon notified the defendant of the loss. Defendant immediately sent its adjuster to investigate the loss. It was conceded by the defendant's counsel that the adjuster of an insurance company is clothed with the power of examining into the facts of the loss, and ascertaining the amount of it by the choice of arbitrators, or by compromise or agreement, and reporting to the company the result of his investigations. This adjuster met Thomas J. Gristock, who resided upon the farm at the time of the fire, and was the son and agent of the plaintiff. They spent several days investigating the loss, during which time a list of the personal property was made, signed, and sworn to by the plaintiff's son. A builder was employed to make an estimate of the value of the buildings. An agreement was reached as to the value of all except the house. Mr. Gristock and the adjuster agreed to refer the value of the house to arbitration. Each was to select one arbitrator, and, if they failed to agree, the two to choose a third, whose decision they agreed to abide by. They agreed to meet with the arbitrators five days after, and close the matter up. Before the time had arrived, the adjuster wrote Mr. Faxon that he could not meet with Mr. Gristock at the time appointed. Mr. Gristock, relying upon this, did not make out the formal proofs of loss as provided by the policy. Four days before the time to make such proofs had expired, Mr. Gristock consulted his attorney, who

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advised him that no other proofs of loss were necessary. Shortly after the 30 days had expired, Mr. Gristock saw the adjuster, who asked him if he had sent in proofs of loss, to which Mr. Gristock replied that he supposed the proofs had already been made out, with the exception of the house, and that he had been waiting on his motion for that ever since he went away. On December 4, 1888, Mr. Gristock wrote the defendant informing it of what had occurred between himself and the adjuster, and asking for a speedy adjustment. Defendant's general agents in Chicago replied, under date of December 12, in which, after stating that the adjuster denied his statements contained in the letter, they say that they are advised by their counsel that the policy is null and void. Such, in brief, is the testimony on the part of the plaintiff. The defendant introduced no testimony.

The circuit judge, after stating, in substance, the above facts to the jury, instructed them that if the conduct and acts and conversation of the adjuster would induce an honest belief on the part of Mr. Gristock that the proofs that were being made, and the certificates that were being furnished, and the negotiations that were being had, were all that were required by the company, and that Mr. Gristock acted with an honest belief that these were all the company required, and that he was warranted from the facts in entertaining that belief in good faith, as a reasonable man, then the jury would be justified in finding that the formal proofs of loss were waived on the part of the company. He further charged them that, after the receipt of the letter of December 12, the plaintiff was not required to submit proofs of losses. The charge is sustained by the authorities. *Security Ins. Co. v. Fay*, 22 Mich. 467; *Hibernia Ins. Co. v. O'Connor*, 29 Id. 241; *O'Brien v. Insurance Co.*, 52 Id. 131; *Aurora, etc., Ins. Co. v. Kranich*, 36 Id. 289.

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2. The testimony on the part of the plaintiff showed that defendant's agent, Faxon, was informed by plaintiff before the policy was issued of the existence of certain mortgages upon the property, and that Faxon told him that it was all right. Plaintiff made no written application for this policy. Faxon made a daily report to defendant, in which he stated that there was no mortgage upon the property. Plaintiff's son also testified to informing Faxon of these mortgages. Faxon, who was a witness for the plaintiff, on cross-examination, denied these statements. The judge instructed the jury that if they found that, prior to the issue of the policy, explicit and definite notice of the existence of said mortgages was given to the local agent, the plaintiff would not be precluded from recovery, and that in such case they might treat the knowledge of the agent as the knowledge of the company.[1] The charge was correct, within the former decisions of this Court. *O'Brien v. Insurance Co.*, 52 Mich. 131; *Copeland v. Insurance Co.*, 77 Id. 554; *Russell v. Insurance Co.*, 80 Id. 407.

3. In the letter of December 12, above referred to, written by the defendant's agents to plaintiff's agent, referring to the adjuster, is the following language:

"He was sent to your town, and instructed to look into the circumstances, and advise the company in regard to the same, that the company's proper officer might decide what further to do in that regard."

It is claimed by defendant's counsel that this was evidence of the limited authority of the adjuster, and that therefore the negotiations and agreement which were testified to on the part of the plaintiff were without the authority of the adjuster. The obvious reply to this claim is that they were within the general authority of an adjuster, as conceded by defendant's counsel. In the

[1]The facts are more fully stated in head-note 2.

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absence of notice to plaintiff of this limited authority, he had a right to rely upon the general authority possessed by such agents, and to act accordingly.

4. Mr. Faxon testified that he introduced the adjuster to Mr. Gristock; that he heard some of their conversation, but could not state it any further than that they were taking an invoice or inventory of the property saved, and narrating the things that were lost; that they were together two or three days; and that he was in and out several times. Defendant's counsel moved to strike the testimony out as immaterial, and not tending to show a waiver, which the court refused. We see no error in this. It was a part of the history of the transaction. It was competent for the plaintiff to show the circumstances under which the adjuster came, and the length of time spent in the negotiations.

5. The witness Thomas J. Gristock lost by the fire certain personal property covered by a policy of his own. He had made out two sworn statements, one covering his father's loss of personalty, the other his own. These were introduced in evidence. He testified on cross-examination that some of the articles in the statement of his own loss belonged to his father. It therefore became a material question to whom these articles belonged. On redirect examination, the witness was asked: "As a matter of fact, did you ever state, or intend to state, that you owned this personal property?" The witness answered, "No." Counsel objected to the witness testifying to his intention, and moved to strike it out. The court refused, and defendant excepted. The court based its ruling upon the fact that the good faith of the execution of the papers was raised, and therefore the witness could swear to his intent. The witness was entitled to testify that this was a mistake, and in so doing he would indirectly have

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testified to his intention. We think no error was committed by the court in refusing to strike out the evidence.

Judgment affirmed, with costs.

The other Justices concurred.

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Rebecca Henriques v. The Ypsilanti Savings Bank et al.

Bills and notes—Fraud—Good-faith holder—Collateral security.

Complainant was induced to sign two promissory notes as surety for the maker under such circumstances as prevented their enforcement except in the hands of an innocent holder, which notes were received and held by a bank as additional security to the maker's dishonored note. And it is held that the bank parted with no value, and is not an innocent holder of the notes, and that equity will enjoin their collection.

Appeal from Washtenaw. (Kinne, J.) Argued November 21, 1890. Decided December 24, 1890.

Bill to restrain defendant bank from collecting certain notes. Defendant bank appeals. Affirmed. The facts are stated in the opinion.

B. M. Thompson (*J. F. Lawrence,* of counsel), for complainant, contended:

1. In support of the proposition that the notes were void as between the immediate parties, counsel cited *Jacox v. Jacox*, 40 Mich. 473; *Duncombe v. Richards*, 46 Id. 166, 169; *Thorn v. Thorn*, 51 Id. 167, 171; *Munson v. Carter*, 19 Neb. 293; *Hall v. Knappenberger*, 97 Mo. 509; *Ford v. Hennessy*, 70 Id. 580;

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Moses v. Noble, 86 Ala. 407; *Connor v. Stanley*, 72 Cal. 556, 558; *Fisher v. Bishop*, 108 N. Y. 25.

2. Under the rule laid down in the foregoing cases, whoever takes the paper with notice of the fiduciary or confidential relationship existing between the holder and maker takes subject to all existing equities; and in this case Mr. Hemphill knew that the maker was rector of St. Andrew's Church, and that complainant was a member of that church, and an accommodation maker; they were the identical notes which he had filled out and sent to Mr. Earp; citing *Smith v. Kay*, 7 H. L. Cas. 750; *Berdoe v. Dawson*, 34 Beav. 603; *Kempson v. Ashbee*, 10 Ch. App. Cas. 15; and, aside from this, Mr. Earp must be regarded as the agent of the bank in this transaction; citing *Pidcock v. Bishop*, 3 Barn. & C. 605; *Owen v. Homan*, 3 Eng. L. & Eq. 112, 120; *Smith v. Osborn*, 33 Mich. 410; *Bank vs. Webb*, 56 Id. 377, 385.

3. The bank received and held the notes as collateral security merely to a pre-existing debt, and, having parted with no value, is not an innocent holder; citing *Stone v. Welling*, 14 Mich. 514; *Boxheimer v. Gunn*, 24 Id. 372; *Smith v. Osborn*, 33 Id. 410; *Spinning v. Sullivan*, 43 Id. 5; *Waterbury v. Andrews*, 67 Id. 281; *Burroughs v. Ploof*, 73 Id. 607.

J. Willard Babbitt (*Cutcheon, Stellwagen & Fleming*, of counsel), for appellant, contended:

1. As a matter of law, these notes could not have been held by the bank as collateral under the instructions in the letter of Mr. Earp, nor could it sue upon the Morris note; citing *Sage v. Walker*, 12 Mich. 425.

2. As to when a bill or note should be regarded as payment, see *Iron Works v. Hall*, 64 Mich. 169; and the taking of a new note in renewal is *prima facia* a payment; citing *Morrison v. Smith*, 81 Ill. 221; *Frazer v. Boss*, 66 Ind. 1; *Mehlberg v. Tisher*, 24 Wis. 607; *Matasce v. Hughes*, 7 Oreg. 39; *Curtis v. Hubbard*, 9 Metc. 322; *Wait v. Brewster*, 31 Vt. 516; *Ward v. Bourne*, 56 Me. 161; and if a holder receives security from the principal in satisfaction of the bill, it will discharge the surety, though the holder's rights against other parties are reserved; citing *Boultbee v. Stubbs*, 18 Ves. 20; Rand. Com. Pap. § 1823.

3. The bill does not allege, and there is no evidence tending to show, that the action of complainant in signing the notes was in the slightest degree influenced by any confidential relation existing between herself and the maker. The allegation and proof of the pastoral relation is not sufficient to raise a pre-

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sumption of undue influence, which must be alleged and proved as a fact; citing *Jenkins v. Pye*, 12 Pet. 241; *Taylor v. Taylor*, 8 How. 183; *Conley v. Nailor*, 118 U. S. 127; *Mackall v. Mackall*, 135 Id. 167; *Audenreid's Appeal*, 89 Penn. St. 114; *Greenfield's Estate*, 24 Id. 240; *Herster v. Herster*, 122 Id. 239; *Cowee v. Cornell*, 75 N. Y. 100; *In re Smith's Will*, 95 Id. 516; *Fisher v. Bishop*, 108 Id. 25; *Bailey v. Woodbury*, 50 Vt. 166; *Woodbury v. Woodbury*, 141 Mass. 329; *Kerrigan v. Leonard*, 8 Atl. Rep. (N. J.) 503; *Brick v. Brick*, 44 N. J. Eq. 282; *Hemingway v. Coleman*, 49 Conn. 390; *Crowe v. Peters*, 63 Mo. 429.

4. The retention of the Morris note as collateral under the instructions of the letter was proper, and does not affect the question of payment; citing *Woods v. Woods*, 127 Mass. 141; *Gordon v. Price*, 10 Ired. 385; and the act of attaching the notes and letter together constituted a memorandum of the bank, which estops it from denying the acceptance of the notes in suit as a payment to the amount of $6,500, less the discount on the two notes; citing *Iron Works v. Hall*, 64 Mich. 169; Morse, Banks (2d ed.), 191; and a pre-existing debt is a valuable consideration; citing *Bostwick v. Dodge*, 1 Doug. 413; *Elliott v. Miller*, 8 Mich. 132; *Outhwite v. Porter*, 13 Id. 533; *Hanold v. Kays*, 64 Id. 439; and if one joint maker delivers the note, it is conclusively presumed he had authority from the other to do so; citing *Beman v. Wessels*, 53 Mich. 549; and the surrender of an overdue note by an indorsee to an indorser is such a valuable consideration as will hold his indorser on a new note given to take up the old one; citing *Bromley v. Hawley*, 60 Vt. 46; and the release of Mrs. Morris, and the relinquishment of the right to sue Mr. Earp, each constitute a valuable consideration; citing *Bank v. Bridgers*, 98 N. C. 67; *Smith v. Van Loan*, 16 Wend. 659; *Williams v. Little*, 11 N. H. 66; *Barney v. Earle*, 13 Ala. 106; *Bond v. Bank*, 2 Ga. 92; *Robinson v. Lair*, 31 Iowa, 9; *Bank v. Heald*, 25 Md. 562; *Bardsley v. Delp*, 88 Penn. St. 420; *Stedman v. Carstairs*, 97 Id. 234; *Royer v. Bank*, 83 Id. 248; *Bank v. McClelland*, 9 Colo. 608.

GRANT, J. This is a suit in equity to enjoin the defendant the Ypsilanti Savings Bank from enforcing the collection of two promissory notes for $2,500 and $4,000, respectively. They were executed by Samuel Earp and complainant, the latter signing only as surety for Mr. Earp, and were payable to the order R. W. Hemphill, cashier of the defendant bank. Mr. Earp was at the

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time, and had been for several years, rector of the Episcopal Church, at Ann Arbor, where complainant resided. She was his parishioner, and a communicant of his church.

On April 19, 1889, the bank held a note for $6,500, executed by Mr. Earp and Victoria C. Morris, which was then two months past due. This note was discounted for the sole benefit of Mr. Earp. Mrs. Morris, a married woman, was merely a surety, and received no benefit or consideration. When it became due, she declined to renew it. The bank sent Mr. Batchelder, its president, to Ann Arbor, to see Mr. Earp in regard to the matter. On his return, he directed Mr. Hemphill to send to Mr. Earp two notes, one for $2,500, payable in 10 days, and one for $4,000, payable in 30 days, which were the notes now in dispute. The notes, dated April 15, were sent, and on April 19 were returned to the bank, signed by Mr. Earp and complainant, and accompanied by the following letter:

"ST. ANDREW'S RECTORY, ANN ARBOR, MICH.,
"April 19, 1889.

"*My Dear Friend:* I went to see Mrs. M., as Mr. B. requested yesterday afternoon, but found that she had promised her husband during his sickness that she would not sign any more papers for any one. This was occasioned by a loss sustained through another party. She feels that her promise is sacred, and she is so completely crushed anyhow that I could not press the matter any further. I return two notes signed by Miss Henriques, who is just as responsible, and whose funds, perhaps, are in a more available shape. You can retain the other papers as a sort of collateral, Mrs M. having no objection to them as they are, and to her responsibility until they are paid. I hope this will remove your immediate difficulty. I have word this morning that the funds will be on hand within a few days, and all settled. I regret the inconvenience to Mr. B. of coming up here twice. If there is any expense attached to it, please charge it to me.

Yours very truly,
"S. EARP."

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Upon the receipt of these notes, Mr. Hemphill, the cashier, pinned them to the Morris note, put them in an envelope, and in this condition has always kept them. The bank made no entry whatever of the Henriques notes upon any of its books or records. No entry is made in the book of discounts, or the register of bills payable. Mr. Earp had an account with the bank, including the Morris note, but no credit is given him thereon. No indorsement of payment is made upon the Morris note. There is nothing whatever in any record or paper of the bank to indicate that these notes had been discounted, or that they had ever been classified as discounted paper. The only testimony on the part of the bank to show that they were discounted, or that the bank parted with value, comes from Mr. Hemphill, who testified that they were received in payment *pro tanto* upon the Morris note. If so received, only a few dollars of interest remained due upon the Morris note. But there are other significant facts shown by the evidence, bearing upon this question. Mr. Hemphill testifies that, after the receipt of these notes, he held the Morris note under the instructions in the letter above given,—

"As a sort of collateral to the balance of interest that was due on this [the Morris note] and some other little matters that he owed me."

The instructions in the letter are:

"You can retain the other papers [meaning the Morris note] as a sort of collateral, Mrs. M. [meaning Mrs. Morris] having no objection to them as they are, and to her responsibility until they are paid."

Mr. Earp was at this time indebted to the bank, aside from the Morris note, to the amount of several hundred dollars. Mr. Hemphill says that he held the Morris note, expecting to squeeze him on the other matters if he could.

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He admits having told Mrs. Morris in June, when she came to see him about her note, that she and Miss Henriques had better fix the matter up some way among themselves. He also gave similar advice to Mr. Jones, the agent of Miss Henriques, and admits that he might have said that the best arrangement was for each to pay one-half. To neither of these did he state that the Morris note, or any portion of it, was paid. In these interviews he treated it as a full and subsistent obligation. About the time of this interview between Mrs. Morris and Mr. Hemphill, the dishonest transactions of Mr. Earp, at Ann Arbor, had been exposed. The sheep's clothing had been removed, and the wolf, in the garb of the priest, appeared in his true character. It was evidently in consequence of this that Mrs. Morris went to the bank to ascertain what her liability was. She is a lady of the highest character, was not cross-examined, and entirely disinterested as between the real parties to this suit. It does not appear whether she knew that she was not liable upon the note because of her coverture. If she did not, then her testimony was against her supposed interest. Her testimony is as follows:

"I told Mr. Hemphill that I came to see if I was involved in any way through Mr. Earp's transactions. Mr. Hemphill told me that there was a note which I had signed in his favor, but that, since my note had been signed, Miss Henriques had also signed a note, which he held as additional security. * * * Mr. Hemphill told me that he held me jointly responsible with Miss Henriques for the payment of the note."

Mr. Hemphill admits informing her that he still held her note as collateral, but says:

"Mrs. Morris is mistaken in the notes that I held. That is all. I told her that I held them according to Dr. Earp's letter; her note, under his instructions, as collateral security for *anything* that he owed."

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He testifies that he supposed he could so hold it, and did hold it with that understanding until after this suit was brought. About this same time complainant, hearing rumors about these papers, went to Ypsilanti, first to the National Bank, and then to defendant's bank, and was informed by Mr. Hemphill that he had Mrs. Morris' note too.

The complainant is a maiden lady, upwards of 50 years of age, and possessed of considerable property. She had had considerable experience in loaning her money, and had received notes, bonds, and mortgages. She had never signed a note before the ones now in suit. Previously to this, Mr. Earp had so secured her confidence that he had borrowed from her at one time $1,000, at another, $250. On the morning of April 19, 1889, being Good Friday, he called at complainant's home. Her statement of what there took place is as follows:

"He said he had a little matter, a little investment, I think, in Ypsilanti. He would like to ask a favor of me. He said he knew I was a pretty good friend of his. I said I hoped so, and he wished me to sign these papers. He asked me if I would sign a paper. I said, 'Yes.' Then I went up stairs to get pen and ink, and he put the paper on the table, near the end of the room, that stood at the right hand of me, and I commenced to sign the paper, and it was a very uncomfortable position, and I sat down on the sofa, close by the table, with the paper on a book, and he immediately came over in a very quick manner, and seated himself right beside me in a very flurried, quick manner, and I signed the paper. When I had signed that paper, he put another one on the book, with the left part of it turned over, the left corner of it turned over, and his hand around in this fashion [witness shows], and said that there was another one to sign; one was to send away, and the other was to keep. He was sitting at the right of me. He put his hand in this way over the paper."

The first paper signed was evidently the note for $2,500; for she says she saw upon that the words "twenty-five,"

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but nothing more except Mr. Earp's name. The other paper, which was the note for $4,000, was turned over, and held by Mr. Earp in such a manner as largely to conceal its contents. He made no explanation of the purpose or character of the papers, and she asked no questions. She testified that she supposed it was a church matter, and that she did not think it had any reference to bank business, or bank-notes, or anything of the kind; nor did she believe that they involved any pecuniary liability on her part. A very long and rigid cross-examination does not impeach her evidence as above given. Mr. Earp testifies:

"I took the papers to her, and asked her to sign them, and she signed them. I did not tell her what they were. I said I had some papers that I wanted her to sign, and she signed them. I don't remember that she ever signed any other papers with me. I told her that I had a little personal matter at Ypsilanti. I cannot swear, or state positively, what I said to her."

It is unnecessary to detail his testimony; for, in my judgment, his character, as shown by the record, is such as to forbid any confidence in it. He was produced as a witness by the bank, and Mr. Hemphill testifies that the money, obtained by him from the bank, was obtained under false pretenses. The learned circuit judge, who heard the case in open court, and saw the witnesses, says, in his opinion:

"It is incontestable that this maiden lady reposed the fullest confidence in the Rev. Samuel Earp, and, as her rector and spiritual adviser, trusted him most implicitly. To have doubted his honesty, or questioned the rectitude of his intentions, was as foreign to her thoughts as to have denied the sacredness of his high office. To her, he was the embodiment and representative of holiness in human conduct. * * * It is clear that, as between the complainant and Mr. Earp, this transaction cannot stand for a moment in a court of equity."

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A niece of the complainant was visiting her at the time she signed these papers. Whether or not she was present in the room at the time does not appear, but, on cross-examination, complainant testified that immediately after signing the papers she had a conversation with this niece, who told her that she should always look at anything before she signed it, and that complainant replied that, if she could not trust her minister, she could not trust any one.

Mr. Hemphill was acquainted with Mr. Earp, and knew that he was rector of St. Andrew's Church, at Ann Arbor, the only Episcopal Church in the city. He knew Mrs. Morris, who lived in Ann Arbor, and that she was a married woman. Under his direction, the bank had, for some months, been discounting paper for Mr. Earp with Mrs. Morris as surety, which finally resulted in the $6,500 note, which she declined to renew. He had known complainant for 30 years, and knew that the relation of priest and parishioner, if not communicant, existed between her and Mr. Earp. Whether or not these circumstances were sufficient to put the defendant upon inquiry, as to the *bona fides* of the transaction between complainant and Mr. Earp, *quære*. It is not necessary now to pass upon the question.

I concur fully in the opinion of the circuit judge that the transaction between complainant and Mr. Earp was fraudulent. These notes cannot be enforced, except in the hands of an innocent holder. He who has not parted with value is not such a holder. If these notes were received by defendant in payment of the Morris note, then the defendant parted with value; otherwise not. If $6,500 was paid by them upon the Morris note, then that note was worthless *pro tanto*, and could not be used by the defendant for any purpose whatever, except to the

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extent of the few dollars of interest which had accrued after its maturity. The testimony of Mr. Hemphill is utterly inconsistent with the idea that he used it as collateral only to the extent of this unpaid interest. He must be held to know that a paid note could not be held as collateral. The very terms of the letter, which Mr. Hemphill, in behalf of the bank, followed, did not contemplate the discharge of Mrs. Morris; but, on the contrary, expressly stated that she would remain responsible upon it. The letter contains no reference to any other debts of Mr. Earp other than that represented by the Morris note. The authority contained in the letter to hold that note as collateral must be held to refer to the new notes transmitted therewith. The theory of defendant in treating it as paid, and still as collateral, would be a legerdemain in banking without precedent. In my judgment, the evidence in this case leads to but one conclusion, viz., that these notes were not received in payment, but that they were received as additional security to the Morris note. The defendant bank has parted with nothing, and is not therefore an innocent holder. The notes were obtained by fraud, and courts of equity will restrain their collection.

The decree is affirmed, with the costs of both courts.

The other Justices concurred.

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EDWIN D. SEATON v. THE PERE MARQUETTE BOOM COMPANY.

Logs and logging—Contract—Overpayment.

1. In the absence of a contract between a log-running company and a log-owner, fixing the terms and price of running his logs, the company is left, under the statute, to run such of the logs as obstruct the stream, and charge therefor a reasonable compensation.
2. A log-running company is not entitled to charge for running any more logs than are delivered, unless it can show that those undelivered were lost without its fault, and the burden of proof is on the company to show such loss.
3. A log-running company mailed to a log-owner a copy of the "rates and rules of service" adopted by the company in reference to running and delivering logs for the coming year, which provided that final settlement was to be made on the woods scale. The log-owner did not accept the terms and conditions of the company contained in the rules by signing the same, as requested, nor did he comply with the requirement of the rules in other respects; but some time after receiving such copy he filled out and signed, and forwarded to the company, a blank statement it had sent to him, showing the amount of logs put into the river by him, with certain other information as to log-mark, etc. And it is held that there was no such meeting of the minds of the parties as would justify the court in holding that they agreed upon the woods scale as determining the amount which should be paid for running the logs, or the amount of logs which should be delivered by the company.
4. Where, in such a case, the log-owner claimed a large shortage in the amount of logs delivered as between the woods and mill scales, but, to secure their delivery, paid the running charges on the basis of the woods scale, under protest, and sued to recover back the overpayment, an instruction by the circuit judge that unless the jury were satisfied that the company, through its carelessness and negligence in running and delivering the logs, had failed to run and deliver to the plaintiff the amount mentioned in the woods scale, he would not be entitled to recover, but if, through such carelessness and negli-

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gence, the company had only run and delivered the quantity of logs shown by the mill scale, the plaintiff might recover, is as favorable as the company was entitled to.

Error to Mason. (Judkins, J.) Submitted on briefs November 19, 1890. Decided December 24, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

M. B. Danaher, for appellant, contended:

1. Under a count for money had and received damages cannot be recovered to prove which it is necessary to show a breach of a special contract; citing *Phippen v. Morehouse*, 50 Mich. 537; *Butterfield v. Seligman*, 17 Id. 95.
2. The statement of an agent which is not one of fact based on personal knowledge, and which was not made at the time of the transaction to which it relates, nor in the course of his duty as agent, is not evidence against the principal; citing *Converse v. Blumrich*, 14 Mich. 109; *Mabley v. Kittleberger*, 37 Id. 360; *Patterson v. Railway Co.*, 54 Id. 92.
3. That plaintiff saw some of his logs in a boom of another does not tend to show negligence. No system of sorting can prevent the evil of stray logs, and negligence will not be presumed; citing *Transportation Co. v. Downer*, 11 Wall. 129.
4. An offer of settlement which is understood to be made for the purpose of a compromise is not an admission of legal liability; citing *Kinney v. Folkerts*, 78 Mich. 687.
5. There was no evidence to show what the difference in the two scales would naturally be, owing to difference in the judgment of the scalers and the sinking of logs; citing *Ortman v. Green*, 26 Mich. 209; and the mill-scale sheets were therefore irrelevant on any theory of the case.

C. G. Wing, for plaintiff, contended:

1. Under the facts of this case a common-count declaration appears to come easily within the rule stated in *Carney v. O'Neil*, 27 Mich. 497.
2. The mill scale was not introduced as the contract basis of driving charges, but as one means of proving that defendant had not performed its work,—to prove the utter failure to deliver over 20 per cent. of the logs that defendant was paid for delivering. It was a scale of unusual accuracy, made by a

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competent scaler, and stands unquestioned, and was the best attainable evidence. It was, moreover, a scale of logs, not of lumber, as in *Lane v. Boom Co.*, 62 Mich. 67.

CHAMPLIN, C. J This case originated in justice's court. The action was commenced by a summons in *assumpsit* to recover back from the defendant money which, the plaintiff claims, he had overpaid to the defendant, on account of driving some logs.

The defendant is a corporation organized under the laws of the State of Michigan, and engaged in running and driving logs in Pere Marquette river. The plaintiff put certain logs in the river in the spring of 1889, which the defendant ran down the river, and delivered to the plaintiff, during the sawing season of that year. A portion of the logs in question were hemlock, and the balance of them were pine. In the spring of 1889, or in the month of January in that year, the defendant mailed to the plaintiff what is called the "rates and rules of service" adopted by the defendant in reference to its running and delivering logs for the year 1889. These rates and rules for service specified the prices which it would charge for running logs from certain divisions upon the line of the river, and for assorting and delivering the same. The rules also provided, among other things, as follows:

"6. Payments to be made as fast as logs are ready for delivery, before delivery, or logs will be stored at owner's expense. Sworn weekly statements of the amount of logs sawed of each and every mark shall be rendered by each mill-owner, from statement by sworn scaler, to the boom company, on the Monday succeeding; the final settlement to be made on the woods scale."

Rule 7 of the company reads as follows:

"All parties employing the boom company to do their work shall, on the first day of April, and on the first day of each succeeding month, give a sworn statement of

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amount of logs put in by them at the different divisions on the Pere Marquette river and its branches, or charges will be computed from division thirteen for logs in south branch, and from division six in north branch. The company does not hold itself to running the logs absolutely, but only to reasonable diligence after taking possession of the drive. The log-owner receiving this is requested to accept by affixing signature, and returning the same to the boom company by return mail.

"PERE MARQUETTE BOOM COMPANY.

"Accepted.....

"_____18____"

It does not appear, in the case before us, that the plaintiff ever accepted the terms and conditions contained in these rules by signing the same, as requested, and returning them to the defendant; nor does it appear that he complied, in any respect, with rules 6 and 7, with reference to making sworn weekly statements of the amounts of logs sawed, etc., or of the amounts put in on the first day of April, and each succeeding month, on the Pere Marquette river. But it does appear that, some time in the latter part of May, the defendant forwarded to the plaintiff the blank form, to be filled out by him, and returned to defendant, substantially as follows:

"LUDINGTON, May 27, 1889.

"*To the Pere Marquette Boom Company, Ludington, Mich.:*

"The following statement shows the amount of logs and other floatables put into the Pere Marquette river and its branches by ————, as stated."

Then follows a blank for the date, the time from and to which the logs were put in, the name of the logger, the log-mark, the division, the number of logs, and the number of feet, to which is appended:

"I hereby certify that the above statement is correct to the best of my knowledge and belief."

This blank was received by plaintiff, and filled in, showing that the total number of feet was 791,228, and

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the certificate was signed by him, and returned to the boom company.

During the season, the plaintiff made complaints to the defendant that it was not using due care in separating and delivering his logs to his mill, and the officers of the company promised to give the matter their attention, did so, and reported that the men in charge had been careless during most of the season. The plaintiff complained also that all of his logs had not been delivered to him; that there was quite a shortage; that he was satisfied that there was a large shortage, and the officers of the company said that he should go on and saw up his logs, and ascertain how much he had, and they would try to do what was right and fair in the matter; but that, finally, they refused to deliver the balance of his logs, unless he would pay the price which they charged according to the statement sent to them by him, and, in order to get his logs delivered, he was compelled to, and, indeed, they suggested that he should, pay the same under protest, which he did, and then they delivered the logs.

Plaintiff finished sawing, and testified himself, and introduced other evidence, to show that a correct scale of the sawing was kept in the mill, the number of feet of logs which were delivered to him by the defendant being shown by that scale; that it amounted to 636,167 feet, being a shortage from that shown by the woods scale furnished to the defendant on the blank stated of over 155,000 feet; and this suit was brought to recover back what he had overpaid for the running and delivering of the logs.

Upon the trial, the defendant contended that these words: "The final settlement to be made on the woods scale,"—being the closing paragraph of the sixth rule, were binding upon plaintiff, and that it had the right to charge him for running the amount of logs shown by the

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woods scale. There are two reasons why this contention in this case is not correct. The first is that plaintiff never signed the contract. He put the logs into the river, doubtless, intending that the boom company should run them, as any other parties would intend, perhaps, if they neglected to run them themselves, that the boom company should do the work of running them. But, unless there is a contract existing between the parties agreeing upon the terms and price of running, the company is left, under the statute, to run such logs as obstruct the stream, and charge therefor a reasonable compensation. The terms of this statement, embracing the rules, sent out to the different log-owners, contemplate that, in order to make the contract binding between the parties, it should be accepted and signed and returned to the company; otherwise it may be presumed that, in the absence of any contract, the parties are left to that contract which is made by the statute.

But we are not prepared to accede to the proposition that these words were intended, in the connection in which they were used, that this woods scale should be the scale upon which final settlement should be made, and that such scale should be binding upon both parties. The rule does provide that sworn weekly statements of the amount of logs sawed of each and every mark shall be rendered by each mill-owner, from a statement by a sworn scaler, to the boom company, on the Monday succeeding. Now, if the woods scale is to be final and arbitrary of the amount which shall be paid for running the logs, of what use is this provision for the scaling of the logs in the mill, and rendering a sworn statement? Besides, as suggested by the circuit judge, if the woods scale is the criterion, if the party was to pay for the number of feet shown by the woods scale, then the

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defendant would be equally bound to run and deliver that amount upon the final settlement, and, if there was a mistake in the woods scale, it might lay the defendant open to a large liability. We do not think there was any such agreement, or meeting of the minds of the parties, from what transpired with reference to these logs, as would justify us in holding that their minds agreed upon the woods scale which should determine the amount which should be paid for running the logs, or the amount of logs which should be delivered by the boom company. The circuit judge was inclined to the opinion that the parties had agreed upon that as the scale upon which settlement should be made, and instructed the jury that, unless they were satisfied that the defendant, through their carelessness and negligence in the running and delivering of the logs, had failed to run and deliver the logs to the plaintiff, the plaintiff would not be entitled to recover; but that if, by their carelessness, they had neglected to run and deliver the logs mentioned in that scale, and had only run and delivered the quantity shown upon the trial to have been sawed at the mill, then the plaintiff might recover back the excess. We think this was putting the case in as favorable a light before the jury as the defendant was entitled to. It was not claimed that any logs had been run, and were still in the hands of the boom company, upon which the charges had not been paid. They claimed to have delivered all the logs that came to their hands. They certainly were not entitled to charge for running any more logs than they delivered, unless they could show that they were lost without their fault. And we think the burden of proof was upon them, if they claim an excess for running logs which they had not delivered, to show that they had per-

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formed the work, and that the logs had been lost without their fault.

The scale-sheets were properly received in evidence, and we discover no error in the record before us, and judgment is affirmed.

The other Justices concurred.

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ANN BYRNE v. GEORGE HUME, EXECUTOR, ETC.[1]

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Will—Construction—Jurisdiction of probate court—Res judicata—Devise—Incumbered real estate—Legacy.

1. How. Stat. § 5964, gives the probate court jurisdiction in the settlement of estates to construe wills. *Glover v. Reid*, 80 Mich. 228.

   So *held*, where a legatee filed a petition in probate court to compel the executor to pay over the balance of a legacy, a portion of which he had used in paying a mortgage on a farm devised to the legatee, claiming that such was the intention of the testator. The probate court so held, and dismissed the petition, and the legatee did not appeal, but sought to secure *like relief* in the equity court. And it is held that the decree of the probate court determined the construction of the will, and that the question is *res judicata*.

2. A son devised to his aged parents, as *joint tenants*, a farm which he had taken subject to a mortgage, and upon which they resided. He also directed his executor to pay them, or the survivor, a legacy of $3,500 out of his life insurance as soon as it was collected. The executor wrote to the parents that he had collected the insurance, and that, as they were probably aware, their son intended to have the mortgage upon the farm paid off, and inclosed an order for them to sign directing him to make such payment out of the legacy, which they did, and returned the order to him, and he paid the mortgage, and forwarded it to them, and paid them the balance of the legacy.

[1] A rehearing was ordered in this case at the January term, 1891, and the case was again submitted at the April term.

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Accounts were filed, from time to time, by the executor, in one of which appeared a credit for the amount of the legacy, to which objection was filed, but the account was allowed, and no appeal was taken; but no final settlement of the estate was had, as under the will the executor was to carry on the business of the testator, and such final settlement was to be deferred for six years. On the hearing of a petition by the surviving parent for an order directing the executor to pay her the balance of the legacy, the probate court construed the will in harmony with the action of the executor, and dismissed the petition, which order was not appealed from, but the petitioner filed a bill in chancery against the executor to recover the legacy, less the amount paid to her and her husband, which bill is dismissed on the ground that the question of the construction of the will is *res judicata*; and the following propositions are summarized from the opinion:

a—The executor held the funds for distribution to the parties to whom the testator intended by the will to give them, and, if he was at all uncertain whether the testator meant to have the mortgage paid out of the legacy, it was his plain duty to have filed a bill to secure a construction of the will.

b—The settlement of the accounts of the executor, from time to time, in the probate court, though known and assented to by complainant, and the order given for the payment of the mortgage out of the legacy, could not estop complainant from setting up her claim to it.

c—The fact that the executor has paid the mortgage out of the legacy, under the circumstances stated, ought not to change the situation of the parties or their rights, though it may have been paid with the consent of the legatees.

d—It was the plain intent of the testator that his executor should pay the mortgage the same as other debts, and preserve the farm for his aged parents, and to pay to them the legacy as soon as the life insurance was collected, and in making such payment he discharged a legal duty.

Appeal from Kent. (Grove, J.) Argued November 20, 1890. Decided December 24, 1890.

Bill to compel the executor of an estate to pay over a portion of a legacy alleged to be due. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Eggleston & McBride, for complainant.

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T. J. O'Brien and *J. H. Campbell*, for defendant.

LONG, J. The complainant, as survivor or herself and William Byrne, brings this suit against defendant, as executor of the last will and testament of Thomas Byrne, deceased, to recover the sum of $2,429.34, part of a legacy of $3,500 left by said will to herself and her husband, William Byrne, now deceased. The sum in dispute was paid by the executor to satisfy a mortgage upon a farm devised by the same will to the said legatees.

The will of Thomas Byrne, under which this controversy arises, was made on January 17, 1882, and contained the following provisions:

"*Second.* I give and devise to my father and mother, William Byrne and Ann Byrne, of the town of Grattan, in said county of Kent, the farm on which they now reside, situate in said town of Grattan, and described as follows, viz.: The south-east quarter of the south-east quarter, and lot number three (3), all on section twenty-nine (29), in town eight (8) north, of range nine (9) west; to have and to hold the same as joint tenants, and not as tenants in common, in fee-simple; and, if either my father or mother shall die before I do, I then give and devise said farm to my surviving parent, his or her heirs or assigns, forever.

"*Third.* I also give and bequeath to my said father and mother all the stock, utensils, horses, and personal property situate on said farm, and in use in connection therewith; and, if my father or mother shall die before I do, I then give and bequeath said stock, utensils, horses, and personal property to my surviving parent.

"*Fourth.* I also give and bequeath to my said father and mother the sum of thirty-five hundred dollars, and I direct my executor to pay the sum over to them out of my life insurance money payable to my executor as soon as collected; and, if either my father or mother shall die before I do, I then give and bequeath said sum of thirty-five hundred dollars to my surviving parent."

Thomas Byrne died a few days after this will was made. Mr. Hume, the executor named in the will, accepted the

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trust, and qualified and entered upon its execution in March, 1882. The land described in and devised by the second paragraph of the will was formerly owned by Michael Byrne, a brother of Thomas. On February 4, 1875, he borrowed of Aaron Brewer, $2,200, to be paid in five years, with interest at 10 per cent. Michael gave his note and a mortgage on the farm to secure the debt. August 26, 1880, Michael Byrne and wife conveyed the land to Thomas Byrne by quitclaim deed. The deed does not mention the mortgage.

April 17, 1882, Mr. Hume, the executor, had received the insurance money. On that day he wrote to William and Ann Byrne the following letter:

"I have received the insurance money, out of which the legacy left you by your son Thomas was to be paid. As you are probably aware, it was his intention to have the mortgage upon the farm paid up; and if you will sign the inclosed order, and return the same to me, I will get the matter all straightened up. I inclose a receipt for one thousand dollars, and an order on First National Bank, Grand Rapids, and have arranged with the bank to pay you one thousand dollars on presentation of receipt and order properly signed. Of course, if you go for the money yourself, you need not sign or use the order. Sign all the spaces left for dates, names, etc.

"Yours truly,

"GEORGE HUME, Executor."

He had left for these parties $1,000 at the bank, as stated in the letter. With the letter he inclosed a receipt for the money, to be signed by them and returned; also an order to pay the mortgage, to be signed. Mr. Hume then lived in Muskegon; the other parties in Grattan, Kent county. The receipt is for $1,000 on account of legacy. The order to pay the mortgage is as follows:

"GRATTAN, MICH., May 5, 1882.

"MR. GEO. HUME,

"Executor of the Estate of Thomas Byrne,

"Muskegon, Mich.:

"You will please pay out of the legacy left us by

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Thomas Byrne, and have discharged, a certain mortgage on the south-east ¼ of the S. E. ¼, and lot No. 3, section 29, town 8 north, range 9 W., given by Michael Byrne to Aaron Brewer, and then pay over to us the balance of said legacy that may be left in your hands.

"WILLIAM BYRNE.
"ANN BYRNE,
"Pr. A. Byrne."

After receiving the order, the executor, on May 15, 1882, paid Mr. Brewer the full amount remaining due on the mortgage, $2,429.34. The mortgage was discharged of record. The executor took up the note and mortgage, and returned them to William and Ann Byrne. On May 22 following, the executor sent his check of $67.66 to them, as the balance due on the legacy, inclosed in the following letter:

"I inclose my check on First Nat. Bank, Grand Rapids, for $67.66, in payment of balance due you on acc. of legacy left you by your son Thomas. Please sign the inclosed receipt, and return same to me. I inclose herewith Michael Byrne note and mortgage. The discharge is now in the office of the register of deeds, and will be sent you as soon as recorded.

"Truly yours,
"GEORGE HUME, Ex'r."

They signed and returned the receipt to him. It is as follows:

"Received of George Hume, executor, sixty-seven 66-100 dollars, being balance due of $3,500 legacy left us by our son, Thomas Byrne.

"ANN X BYRNE.
"WILLIAM BYRNE."

On March 10, 1883, the executor filed in the probate court for Kent county his first report and account. He gave himself credit for the amount of $3,500 as paid to William and Ann Byrne as legacy under the will, and the Grattan farm was accounted for at $4,800. An order was made and duly published appointing a time for hear-

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ing the account, and a hearing was had, the account being duly allowed. A second and third account was filed by the executor, and notice published; and on the hearing of the third account so presented, John Byrne appeared by Mr. Eggleston, acting as his attorney, and objected to the allowance of the $3,500 as paid to William and Ann Byrne in full of said legacy. The account was allowed, however, and no appeal taken.

On April 14, 1885, Ann Byrne, the complainant in this suit, filed a petition in the probate court praying that the balance of the legacy be paid to her. That petition stated, substantially, the facts now set up in the present bill, and prayed for the same relief. A citation to the executor was issued, and he appeared, and filed his answer. A hearing was had in the probate court, and the petition was dismissed. No appeal was taken from that order. The defense to the present bill is:

1. That the matter in controversy here is *res judicata*, under orders and decrees of the probate court—

a—Dismissing the petition filed by complainant praying for the payment to her of the same money upon the same grounds.

b—Allowing the executor's first and third accounts, which covered the matters in dispute in this suit.

2. The legatees gave to the executor a written order to pay the mortgage out of the legacy, and they were thereby legally chargeable with the moneys paid on the mortgage.

On the hearing in the court below the complainant's bill was dismissed. Complainant appeals. There has been no final settlement of the estate, and a large amount of the funds of the estate yet remains in the hands of the executor. By the terms of the will the executor is to carry on the partnership and other business in which the testator was engaged, and the estate is to be wound up and settled within six years after the testator's death. The estate was inventoried at the sum of $471,000.

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The settlement of the accounts of the executor, from time to time, in the probate court, though known and assented to by the complainant, could not estop her from setting up her claim to this legacy, nor could the order given for the payment of the mortgage out of the legacy.

Considerable testimony was taken in the court below as to the physical and mental condition of the complainant and her husband at the time these papers were executed, and the circumstances under which the signatures of the parties were obtained. It is claimed on the part of the complainant that William Byrne, at the time these transactions occurred, was not of sufficient mental capacity to transact business intelligently, and that Mrs. Byrne could neither read nor write, and did not understand that she was giving up the legacy to pay the mortgage. These were disputed questions of fact on the hearing, and upon which some considerable testimony was given; but just what question was the decisive one in the opinion of the trial court does not appear from the record before us. It is not shown whether the trial court concluded that the parties were estopped from now making the claim to the legacy, or that, the petition having been heard in the probate court upon the same matter and for the same relief, it was *res judicata*.

The executor held these funds for distribution to the parties to whom the testator intended by the will to give them. If the executor was at all uncertain whether the testator meant to have the mortgage paid out of this legacy, his plain duty was to have filed his bill for a construction of the will. If the executor refused to pay the legacy, and there was a contention as to the true intent and meaning of the will, a court of equity should have been appealed to for a settlement of that question. The fact that the executor has paid the mortgage out of the legacy, under the circumstances stated upon this record,

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ought not to change the situation of the parties or their rights, though it may have been paid by the consent of the complainant and her husband. If it was the intent of the testator that the executor should pay and discharge the mortgage, and that his father and mother should have the farm disincumbered of the mortgage, and, in addition, should have the full amount of the legacy, then the executor in the payment and discharge of the mortgage has done no more than he was legally bound to do, and what the court having jurisdiction of the matter should have compelled him to do. He had the funds of the estate still in his hands, sufficient to have his account adjusted without personal loss to himself, and would be put in no different position by the fact of the payment of any of the legacy than if it had been paid by any other funds. It was a question, pure and simple, between the estate and Ann Byrne, and must have depended upon the construction to be given to the will. The only guide in determining that question is, what is the intention of the testator? If this can be ascertained from the terms of the will, it must be followed.

A will is said to be a declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death. The parts of the will important to this question have been set out. By the second clause he gives his parents the farm to hold as joint tenants, and not as tenants in common; and he is particular to state that the survivor should take the whole. It would appear from this clause, and the circumstances in which his parents were placed, that he intended this for the home of his aged and infirm parents, and to put it in such form that no one could acquire the separate rights or estate of either without the joint act of both. He, by the third clause, gave them all the personal property on the farm, and the survivor was to take that.

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By the fourth clause he bequeathed to them the legacy of $3,500 out of his life insurance money, and directs its immediate payment to them by the executor as soon as collected, and he provides carefully in this clause that the survivor of them shall have this sum. Taking the will as a whole, in view of the large estate possessed by the testator, and his evident desire to make a home for these old people, it cannot be said that he intended to have this large mortgage upon the farm which they were to possess and enjoy, and where the survivor was to live after the death of the other, or to have and control, and compel them to pay it, or, in default, to lose the farm, and be turned out upon the world. If the legacy was to be set aside to pay it, he has made no such direction, but, on the contrary, has directed its payment immediately over to his parents. No one, in reading this will, considering the situation of the parents, their age and infirmities, and the estate possessed by the son, and his evident desire to preserve a home for them, can consistently claim that it was the intent of the testator that the mortgage should either be left upon the farm, and eventually foreclosed, and his parents turned out of a home, or that the legacy should be used in its payment and discharge after coming into the hands of the parents. It was the plain intent of the testator that his executor should pay and discharge this mortgage the same as other debts, and preserve the home for these aged people, and to pay this legacy over as soon as collected. In paying the mortgage, he has discharged a legal duty.

Had the question been presented to us as one upon which we had now the power of direction, we should unhesitatingly hold that it was the duty of the executor to pay over to the complainant the balance of the legacy. But it is her misfortune that she did not appeal from the

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order of the probate court. There, a petition was filed setting out, substantially, what is set out in this bill, and the probate court ruled the construction of the will against her. From this decree denying her rights she has not appealed. Under our former ruling, we have settled the doctrine in this State that the probate courts have the jurisdiction in the settlement of estates to construe wills. *Glover v. Reid*, 80 Mich. 228, and cases there cited. This jurisdiction is given under How. Stat. § 5964. It is true that the cases cited arose under appeals from probate courts; but the doctrine laid down in those cases clearly recognized the jurisdiction conferred by the statute. The decree of the probate court must therefore be held as determining the construction of the will, and *res judicata* to the present bill.

The decree of the court below must be affirmed, with the costs to be paid out of the estate.

The other Justices concurred.

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THE KALAMAZOO HACK & BUS COMPANY (LIMITED) v. OSCAR SOOTSMA.

Railroad companies—Common carriers—Exclusive privileges to hack and bus men.

1. A railroad company cannot legally give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds, to the exclusion of others engaged in the like business of the carriage of passengers and freight to and from its depot.
2. The following general propositions are summarized from the opinion of Mr. Justice MORSE:

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a—How. Stat. § 3355, requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, does not relate entirely to the mere carriage *in the cars* of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies, or corporations" at the point upon its road where the carriage ends.

b—A railroad company can make all needful reasonable rules and regulations concerning the use of its depot and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from its trains or depots, and it *probably* can prohibit all persons from soliciting business for themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so.

Error to Kalamazoo. (Buck, J.) Argued November 20, 1890. Decided December 24, 1890.

Trespass. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Osborn & Mills, for appellant.

Hawes & Luby, for defendant.

MORSE, J. The Kalamazoo & Hastings Construction Company, a limited copartnership, operating the Chicago, Kalamazoo & Saginaw Railway, being in the actual occupancy of a piece of land used by it as depot grounds in the city of Kalamazoo, leased to the plaintiff, also a limited copartnership, operating a hack and bus line in said city, a certain portion of said premises, described in the lease as—

"That piece of ground lying and being between the sidewalk on the east side of Walbridge street and the side track of the Chicago, Kalamazoo & Saginaw Railway, in said city, being 70 feet in length from the south end of the depot there situate, said piece or parcel of ground to be occupied by said second parties for the purpose only

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of an omnibus, baggage-wagon, and hack stand, at and about the time of the arrival and departure of trains upon said railway: *Provided*, said second parties shall permit the United States mail-wagon and the American Express Company's wagon, doing business in the city of Kalamazoo, to stand and occupy that portion of said piece or parcel of land which shall be assigned for that purpose by Lewis Sergeant,—for the term of two years, commencing on the 21st day of July, 1890, and ending on the 21st day of July, 1892."

Lewis Sergeant allotted the mail and express wagons 20 feet of ground immediately south of the depot. He also posted in two conspicuous places, upon and adjacent to the depot, the following notice:

"CHICAGO, KALAMAZOO & SAGINAW RAILWAY CO.
"GENERAL OFFICE.
"KALAMAZOO, MICH., July 21, 1890.

"*Notice to whom it may concern:*

"The Kalamazoo Hack & Bus Co. have leased that piece of ground which lies within a distance of seventy (70) feet immediately south of depot at Kalamazoo, and between side track and sidewalk on east line of Walbridge street. Said lease contains provision that Bus Co. will assign place on this ground for American Express Co., and mail-wagon. L. SERGEANT,
"Supt. C., K. & S. Ry."

Mr. Sergeant also informed the hack and bus men generally that the ground described in said lease had been leased exclusively to the hack and bus company (the plaintiff), and that others must keep off. It also appeared that previous to the making of this lease this ground had been occupied by all the hack and bus men in the city, the defendant, among others, having been in the habit of going upon this ground and standing indiscriminately about the depot seeking passengers.

On August 1, 1890, the defendant, Sootsma, placed his hack upon the grounds so leased to plaintiff, and, upon being requested to move therefrom, refused to do so. He remained there until an incoming train, and obtained a

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passenger, and drove away with him. The plaintiff thereupon commenced suit in trespass against Sootsma in justice's court, which resulted in judgment for defendant. Plaintiff appealed to the circuit court, where the circuit judge directed a verdict in favor of the defendant, on the ground that the lease was invalid, as opposed to public policy; that the lessor had no right to grant the exclusive use of the land to the plaintiff for the purposes mentioned in the lease.

There was some contention in the court below, and in this Court, regarding the right of plaintiff to bring an action of trespass under this alleged lease, the defendant claiming that it was a mere license conveying no property in the soil. In the view we take of the case, this question does not become material.

The plaintiff gave evidence in its behalf, upon the trial in the circuit, tending to show that, in the selling by the construction company of tickets upon its road to points upon other roads, west of Kalamazoo, a coupon was attached to the ticket, entitling the passenger to transfer with baggage across the city of Kalamazoo to the railway station at which the journey was to be resumed, and that an arrangement had been entered into with the plaintiff to perform such service, and carry such baggage and passengers; that, prior to the making of the lease, there had been trouble between the hack-men and the busmen at the depot. Hack-men, not connected with plaintiff's line, in some instances, solicited and secured passengers, who supposed they were to be carried on these transfer coupons, and, at the end of the trip, refused to accept such coupons, and charged them for so carrying them. This made trouble between the railroad company and passengers, and also was the cause of disorder and quarrels between the various hack and bus men about the depot, and the lease was made to avoid such trouble and

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annoyance. It was not shown, however, that defendant had ever been engaged in any quarrels, or that he had refused to carry passengers upon such coupons, or had solicited passengers with the idea that he would carry them upon the coupons, and then refused to accept them, and demanded at the end of the trip other compensation for carrying them. But it is no matter for what purpose this lease was made, as long as no improper action upon the part of the defendant was shown to have induced it.

The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hack-men and bus-men, to the plaintiff, was a discrimination against the defendant, as well as all other hack-men and bus-men, not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds, for the standing of hacks and buses, and the solicitation of passengers therefor.

How. Stat. § 3355, provides that—

"All railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations."

A violation of this statute is punished by a penalty. This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective, it must be construed to include also not only the receiving of such passengers and freight at its depots, but, as well, the receiving of them by other "persons, companies, or corporations" at the point upon its road where the carriage ends. The access to its depots must be free and equal to all, whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack and bus company exclusive access to its depots, or even better access than

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to others, in the carriage of passengers or freights to its trains. Nor can it any more appropriately give such exclusive or better privilege to such company taking passengers or freights from its trains, to be transported from thence elsewhere. Therefore, the circuit court was right in directing the verdict as he did.

But independently of the statute, upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or the passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. Such rules and regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company upon any pretense, except of wrong or misconduct on the part of the person excluded, to allow one hack-man or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice Field, in *Railroad Co. v. Tripp*, 147 Mass. 43 (17 N. E. Rep. 95),—

"To enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public."

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The rules and regulations of a railroad company in this respect must be not only reasonable, but they must not unnecessarily infringe upon the rights of the public, and others having or carrying on business in connection with railroad traffic or travel. *Summitt v. State,* 8 Lea, 413. It has been held in Massachusetts that a railroad corporation may contract with one to furnish the means to carry incoming passengers, or their baggage or merchandise, from its stations, and may grant to him the exclusive right there to solicit the patronage of such passengers; but three of the seven members of the supreme court dissented therefrom, giving, it seems to me, much the better reason for such dissent. *Railroad Co. v. Tripp,* 147 Mass. 35. I can find no other case holding this doctrine. In *Cravens v. Rodgers* (Mo.), the contrary doctrine is held. The granting to the owner of one bus line the exclusive right to the best part of a railway platform at the depot, and confining a rival line to other parts of the platform, where the chance of getting passengers was not so good, was held to be a discrimination tending to destroy competition, and to encourage a monopoly, which is obnoxious to the spirit of our laws, and contrary to the constitution of Missouri, which prohibits "discrimination in charges or facilities in transportation * * * between transportation companies and individuals, or in favor of either." 14 S W. Rep. 106. And in *Railway Co. v. Langlois* (decided by the supreme court of Montana, May 1, 1890), reported in 24 Pac. Rep. 209, it is held that a railroad company cannot grant the right to receive and discharge passengers at its platform to one hack-owner to the exclusion of others. In an able opinion, the case of *Railroad Co. v. Tripp, supra,* is reviewed, and the argument of the majority opinion in that case criticised and controverted. For other cases bearing upon this question, see *Marriott v.*

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Railway Co., 1 C. B. (N. S.) 499; *In re Palmer*, L. R. 6 C. P. 194; *In re Parkinson*, Id. 554; *Camblos v. Railroad Co.*, 9 Phila. 411; *Express Co. v. Railroad Co.*, 57 Me. 188.

While many of the cases above cited are decided in reference to statutes of the same import as our own, it is clear to me that the action of the construction company—railroad company—in this case, in leasing this ground to plaintiff, would, if sustained as valid, tend to encourage and promote a monopoly of carriage of passengers from this depot at Kalamazoo, not only to connecting routes of travel upon other railroads, out of the city, but to places within the city, contrary to the spirit of our laws, and against that public policy that refuses to encourage or foster monopolies in any kind of business.

The plea is made that the railway company, owning these grounds, or having the actual occupancy and possession thereof, has the same right of control over them that any citizen would have, under similar circumstances, provided only that it discharges its duties to the public, with reference thereto, as a common carrier. This is true. But when the ground is used in its business as common carrier, and for the purpose of the standing or "setting" of hacks and buses to solicit the patronage of incoming passengers, then it must use it for the benefit of all, and not for the privilege of one. It could probably refuse, if such refusal was reasonable in that there was other proper ground for them to stand upon, to permit any hacks or buses to occupy the ground at all; but, if it opens the door to one, all must enter and have equal facilities and privileges one with the other. No doubt one wrongfully creating disorder or disturbance upon this ground, or defrauding or deceiving passengers, could be lawfully ejected therefrom, and, persisting in such conduct, be forever barred therefrom by the railroad company; but that would be a matter for

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the railroad company, rather than the plaintiff. As the case stands, the plaintiff had no better right upon the premises than Sootsma.

The judgment of the court below is affirmed, with costs.

The other Justices concurred.

JAMES W. LUCAS AND CARRIE A. PARKS, BY HER NEXT FRIEND, v. JOHN PARKS ET AL.

Mortgage foreclosure—Redemption—Fraud—Recording laws—Notice—Good-faith purchasers.

This case involves the alleged fraudulent action of a father in securing the foreclosure of two mortgages upon land the title to which was in his wife at the time of her death, and obtaining the title growing out of such foreclosures, for the purpose of cutting off the rights of his infant daughters in the land as heirs of their mother, and an examination of the entire opinion is essential to an understanding of the decision of the Court.

Appeal from Clinton. (Smith, J.) Argued November 20, 1890. Decided December 24, 1890.

Bill to set aside certain conveyances based upon the title attempted to be procured by a mortgagor through an alleged fraudulent purchase of the mortgaged premises upon foreclosure, and to quiet complainants' title thereto. Complainants appeal. Decree modified and affirmed. The facts are stated in the opinion.

Vosper Bros. (*J. C. Blanchard*, of counsel), for complainants, contended:

1. To render a wife liable upon a note signed by her husband, proof

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must be made of the facts connecting her with the consideration; citing *Insurance Co. v. McClellan*, 43 Mich. 564; *Reed v. Buys*, 44 Id. 80; *Edwards v. McEnhill*, 51 Id. 160; *Schlatterer v. Nickodemus*, Id. 626; and the note signed by John Parks and his wife, under the proofs in this case, is but *his* note; citing *Russel v. Bank*, 39 Mich. 671.

2. The McBlain mortgage was an incumbrance upon the premises at the time John Parks conveyed them to his wife by warranty deed, and he became legally and equitably liable to pay the mortgage, and any interest subsequently acquired by him would feed his deed, and inure by way of estoppel to the benefit of his grantee and her heirs; citing *Shotwell v. Harrison*, 22 Mich. 410; *Damouth v. Klock*, 29 Id. 289; *Lee v. Clary*, 88 Id. 223; *Smith v. Williams*, 44 Id. 240.

3. But it is not conceded that John Parks acquired any interest in the premises through the foreclosure of the McBlain mortgage. What he did was but a payment and satisfaction of his own debt, or, at most, but a redemption by the mortgagor, and a duty he owed to the heirs of his wife; and any colorable title he might have acquired through such foreclosure would be held in trust for them; citing Jones, Mort. §§ 864, 865; *Wadsworth v. Williams*, 100 Mass. 126; and, as to the Parks mortgage, his wife had, at most, but made her property surety for his debt, and the same rule as to suretyship applies; citing Jones, Mort. § 114.

4. The question of the defendants being good-faith purchasers or incumbrancers has no foundation in this case, for the records fully apprised them that John Parks was but paying his own debts, which he was under moral and contract obligation to pay, and that the deed he received would inure to the benefit of the heirs of his wife, and operate as a discharge of the mortgage; citing *Baker v. Mather*, 25 Mich. 51; Jones, Mort. §§ 864, 867; and the continued possession of the premises by the heirs was notice to all the world of what rights they had therein; citing *Russell v. Sweezey*, 22 Mich. 235.

5. Silence respecting facts already known by the other party, or where facts are equally known by both parties, never constitutes ground for an estoppel; citing 3 Washb. Real Prop. (4th ed.) 74; *Hill v. Epley*, 31 Penn. St. 331; and defendant Langenbacher had not only the means of knowing, but actually knew, more about the facts affecting the title to the land she was loaning money upon than Mrs. Hurlbert, whose silence in no way influenced her action, as she relied exclusively upon her legal adviser and agent, Hammond. Besides, Mrs. Hurlbert was under no obligation to expound to her her opinion of the

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force and effect of the foreclosure proceedings, or as to the state of the title; citing *McAuliffe v. Mann*, 37 Mich. 539; nor would such opinion, if expressed, afford ground for an estoppel; citing *Thayer v. Arnold*, 32 Mich. 336.

6. The law does not permit title to land to rest in parol, nor anything evidenced by the deeds to be changed by parol testimony; citing *Hayes v. Livingston*, 34 Mich. 384; nor can oral statements or silence have the effect, in courts of law or equity, to pass a title or create an interest in lands, which the statute expressly declares can only be created by writing; citing *Nims v. Sherman*, 43 Mich. 45; *Shaw v. Chambers*, 48 Id. 355; and, finally, if Mrs. Langenbacher claimed the benefit of an estoppel from proof of what occurred at the farm, she should have so stated in her answer; citing *Dale v. Turner*, 34 Mich. 405; *Smith v. Rumsey*, 33 Id. 189; *Whittemore v. Stephens*, 48 Id. 578; *Kelly v. Kelly*, 54 Id. 30; and no affirmative relief can be awarded a defendant in the absence of a special prayer therefor by an answer under the rule or by a cross-bill; citing *Pattison v. Hull*, 9 Cow. 747; *Vary v. Shea*, 36 Mich. 388; *Vroman v. Thompson*, 51 Id. 452.[1]

7. In answer to the claim of Mrs. Simmons and Mrs. Langenbacher to subrogation, and in support of the proposition that a person cannot, in the absence of contract obligation, or an interest in the subject-matter, requiring the advancement of money to fulfill such contract or protect such interest, of his own motion, or as a mere volunteer, clothe himself with the rights and securities his money may have gone to extinguish, counsel cited Jones, Mort. §§ 869, 874, 877; *Smith v. Austin*, 9 Mich. 465, 474; *Kitchell v. Mudgett*, 37 Id. 81; *Mather v. Jenswold*, 72 Iowa, 550; *Mickles v. Townsend*, 18 N. Y. 575; *Sanford v. McLean*, 3 Paige, 117.[2]

Fedewa & Lyon, for defendant Simmons, and *Spaulding & Walbridge*, for defendant Kempf, contended:

1. It cannot be claimed that John Parks redeemed from the foreclosure of the McBlain mortgage, under which the title matured in the mortgagee on January 12, 1879, for, while his deed to Parks is dated and acknowledged prior to that date, it was not delivered until January 13, and no title passed until such delivery; citing *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

2. The deed to Mrs. Parks was a voluntary conveyance, and in effect a quitclaim deed, and any after-acquired title by Parks

[1] See *Castle v. Castle*, 78 Mich. 298, 300.

[2] See, as to general doctrine of subrogation, *Bush v. Wadsworth*, 60 Mich. 255 (note).

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would not inure to the benefit of Mrs. Parks or her heirs; citing *Wilbur v. Warren*, 104 N. Y. 192; and the testimony shows that it was the intention of the parties that the deed should not take effect if Mr. Parks recovered, which is controlling; citing *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

3. In support of claim to right of subrogation and to compensation for improvements, counsel cited *Lockwood v. Bassett*, 49 Mich. 550; *Kelly v. Kelly*, 54 Id. 48.

Kilbourne & Humphrey, for defendant Langenbacher, contended:

1. One who has acquired possession of mortgaged premises, in the belief that he holds title under foreclosure proceedings, is entitled to claim, upon redemption being made under the mortgage, the value of his improvements; citing Jones, Mort. § 1128; *Roberts v. Fleming*, 53 Ill. 196; *Bacon v. Cottrell*, 13 Minn. 194; *Miner v. Beekman*, 50 N. Y. 337.

2. The deed from John Parks to his wife conveyed no title, because it was not intended to unless he died; citing *Pennington v. Pennington*, 75 Mich. 600; *McCullough v. Day*, 45 Id. 554.

3. The foreclosure of the William Parks mortgage cut off all apparent title in Maria Parks to the entire farm, if she had a title under her deed, in which case she was competent to make the mortgage, and her husband's signature was unnecessary; citing *Frickee v. Donner*, 35 Mich. 151; and on its foreclosure he had a right to become the purchaser. Nor is it of consequence that the money secured by the mortgage was for his use, or that it was given to secure his debt; citing *Watson v. Thurber*, 11 Mich. 457.

4. McBlain's quitclaim deed, if delivered January 6, was adequate to convey all the title he had, and all that might accrue under the sheriff's deed, soon to become operative; citing How. Stat. §§ 5653, 5729; *Hoffman v. Harrington*, 28 Mich. 90; *Thayer v. McGee*, 20 Id. 195; but the deed did not become operative until its delivery, January 18, when the title of the grantor under the foreclosure had fully matured. But if the finding is against us on the foreclosures, those claiming under the Simmons deed and Langenbacher mortgage are entitled to be put in the place of the mortgagees, whose mortgages they have furnished money to discharge; citing *Insurance Co. v. Aspinall*, 45 Mich. 330, 48 Id. 288; *Lockwood v. Bassett*, 49 Id. 546; *Warner v. Hall*, 53 Id. 371; *Kelly v. Kelly*, 54 Id. 30.

MORSE, J. This is a controversy involving the title to

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about 170 acres of land, situated in the county of Clinton, in this State. The undisputed facts are as follows:

1. On November 30, 1874, the defendant John Parks was the owner in fee-simple of, and with his wife, Maria T. Parks, lived upon, the premises. At this date he was very sick, and not expected to live, and conveyed, in anticipation of his death, the land to his wife by warranty deed, but without any money consideration. At the time of the execution of this deed, there was a mortgage upon the premises running to one Thomas McBlain, in the sum of $500. This mortgage was executed March 1, 1872. After the deed from Parks to his wife, and on October 24, 1876, John Parks executed a mortgage on the same lands to his brother, William Parks, for $238. Maria T. Parks joined with her husband in this mortgage.

2. In 1877, Maria T. Parks died, leaving two minor daughters, Mary Jane, now the wife of Charles S. Hurlbert, and Carrie Parks, as her sole heirs, aged respectively about 10 and 5 years at the date of their mother's death. The legal record title at the time of Mrs. Parks' death stood in her name, subject only to the McBlain and William Parks mortgages. McBlain commenced proceedings to foreclose his mortgage by advertisement before the death of Mrs. Parks, and on January 12, 1878, the premises were sold upon such foreclosure to Thomas McBlain, the mortgagee, and a sheriff's deed executed and delivered to him. On January 9, 1879, McBlain and wife conveyed the lands by quitclaim deed to John Parks. The deed was dated on the 6th, but acknowledged on the 9th, of January. McBlain lived in Geneva, N. Y., and the deed was executed there. After the death of Mrs. Parks, William Parks foreclosed his mortgage, and at a sale had thereunder, May 30, 1878, John Parks became the purchaser at the sum of $330.76.

3. These proceedings put the apparent legal title back into John Parks, and February 3, 1879, he conveyed by warranty deed the west 70 acres of these lands to John P. Simmons. March 28, 1882, Simmons and wife deeded the same to August Watt. Watt paid Simmons $1,850 in cash, and gave a mortgage back to him for the balance of $2,000. Simmons afterwards died, and his widow, the defendant Nancy Simmons, became the owner of this mortgage, which she now holds. The defendant Reuben Kempf also holds a mortgage for $1,200 upon this 70

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acres, given by Watt as security for money borrowed of Kempf to pay Simmons on the purchase of the premises. Simmons moved upon the land and made improvements. Watt, upon his purchase, took possession of the land, and has occupied it ever since, and also improved it. These improvements, consisting of buildings, orchard, etc., are valued at from $1,500 to $2,000. This is the history of the 70 acres.

4. The original homestead was upon the remaining 100 acres. John Parks, after his wife's death, remained upon this portion of the premises, and managed and dealt with it as his own, until his second marriage, in 1882, when he moved upon his wife's farm, renting this place to Charles S. Hurlbert, his son-in-law, who paid him rent, and now lives upon it. While Parks lived upon this 100 acres, his children resided with him. Carrie Parks, who was not of age at the time the testimony was taken in this suit, has, since her father moved away, made her home with her brother-in-law, Hurlbert.

5. While Parks was in the occupancy of this 100 acres he gave several mortgages, as follows: John Parks to Thomas McBlain, November 11, 1880, $1,100; John Parks and wife to Samuel E. Hart, November 15, 1883, $1,600; John Parks and wife to A. J. Baldwin, November 19, 1883, $100. To discharge these mortgages, and obtain a lower rate of interest, John Parks borrowed of the defendant Barbara Langenbacher the sum of $3,200, and he and his wife, November 7, 1885, gave her a mortgage to secure that sum upon the land, the 100 acres, which she now holds. With the money obtained from Mrs. Langenbacher, he paid up the three mortgages above noted, and they were discharged of record.

6. February 1, 1886, Mary Jane Hurlbert, formerly Mary Jane Parks, executed a quitclaim deed of all her right, title, and interest in the whole 170 acres, being an undivided one-half interest in the same, as heir at law of her mother, Maria T. Parks, to the complainant James W. Lucas.

In August, 1886, this bill was filed by Lucas and Carrie Parks, by her next friend, praying that the title to the whole premises be decreed to be in them, and that the mortgages held by the defendants Nancy Simmons, Reuben Kempf, and Barbara Langenbacher be delivered up

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and canceled. The bill alleges in support of this prayer that John Parks obtained the title to these premises after his wife's death by fraud; that an agreement was made between him and McBlain, with the knowledge and assent of Simmons, who was about to purchase the 70 acres, that instead of the payment of the mortgage by Parks, and its cancellation and discharge, McBlain should bid the premises off in his own name at the foreclosure sale, and, after his title had ripened, deed the same to Parks, thus cutting off the infant children, and defrauding them, and putting the title in Parks; that Parks bid in his own mortgage to William Parks, having it foreclosed, and a deed made to him, in the furtherance of the same fraud. The bill also charges a knowledge of this fraud upon all the defendants before they acquired any interest in said premises. The defendants Parks and Watt made no defense, and were defaulted. The others answered, denying any knowledge of the alleged fraud, and setting up their equities in the premises.

The evidence was taken in open court before the Honorable Vernon H. Smith, then judge of the Clinton circuit court, who dismissed the bill of complainants upon two grounds:

1. That it was not the intent of John Parks, at the time he made the deed to his wife, to convey the absolute title to her at once, but that it was delivered upon the condition that if he recovered it should not be valid, or of any effect,—if he died it was to be valid, if he lived it was to have no effect; and that Mrs. Parks received it under this understanding.

2. That the equities of the defendants are such that the complainant James W. Lucas, who bought the title upon speculation, is estopped by his own knowledge, and that of his grantor, Mary J. Hurlbert, and her acts, from disputing the mortgages; and that August Watt was a good-faith purchaser of the 70 acres, without any knowledge of any fraud in the obtaining of the title by Parks.

We are satisfied that the bill ought to be dismissed

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without any doubt against all the defendants except John Parks upon the equities of the case. We are not convinced that Mr. Simmons had knowledge of any fraud being committed upon the children when he purchased the 70 acres. Simmons is dead, and cannot speak for himself; but his wife testifies that she had no knowledge of any fraud. The fact that Simmons knew anything about a scheme between McBlain and John Parks to defraud his children depends entirely upon the testimony of John Parks, who appears to be the only witness presented to establish his own fraud. He swears that he was counseled by the Perrins and Baldwin, attorneys at St. Johns, that this was the course to take to get the title back into his hands, and that Simmons was present when this advice, upon which Parks claims he acted, was given. Both the Perrins and Mr. Baldwin emphatically deny that they ever gave him any such advice. We do not feel obliged to believe Mr. Parks under these circumstances, and we must find that Watt, and Nancy Simmons, who holds the mortgage given to her husband, are good-faith purchasers. This ends the controversy as to the 70 acres, and the bill must be dismissed as against them and the defendant Reuben Kempf, as there is no pretense that he had any notice of the alleged fraud, except such as the record gave him. We do not think the record of the title, as it appeared in the office of the register of deeds, was notice to any one that any fraud had been committed.

In relation to the 100 acres, it is conclusively shown that the money advanced by Mrs. Langenbacher was all used, except, perhaps, a few dollars, in payment of existing and valid incumbrances upon it,—mortgages put upon the premises by John Parks, while the legal title stood in him,—and with no proof that any of them were fraudu-

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lent as against these heirs, or taken with any notice of their equities. Mrs. Langenbacher would have the right as against the complainants to be subrogated to the rights of these mortgagees, her money being used in their discharge. Nor did she have any notice of the claims of these heirs. She went up and looked at the premises before she loaned her money, and saw Mrs. Hurlbert there. Mrs. Hurlbert knew what she was there for, and also knew her own rights as well then as she does now, and yet she did not even hint to Mrs. Langenbacher that her father had no right to mortgage the premises. And Hurlbert, her husband, testifies that he knew his wife's rights in the premises, and knew that Mrs. Langenbacher was about to loan this money to John Parks for the express purpose of removing the existing mortgages; that, while the negotiations were going on between Mrs. Langenbacher and Parks for this loan, he went to the office of Hammond, at North Lansing, who was her attorney, and obtained the abstract of title of the land, which Parks had given to the son of Mrs. Langenbacher, that he and Lucas might take the same to Mr. Blanchard, at Ionia, to get his advice as to his wife's rights in the land; and that he did not acquaint Hammond, or the Langenbachers, with the fact that his wife claimed title to the land, or that there was any defect in Parks' title, because he was not "open hearted" or "green enough for that;" and that he did not want Mrs. Langenbacher to know about the claim of the heirs until she had loaned the money, and taken up the mortgages then on the place, as they were about to be foreclosed, and he was financially embarrassed, and would thereby get further time in which to raise the point of his wife's title to the premises.

"*Q.* Mrs. Langenbacher's money gave you a breathing spell until you could find this fellow [Lucas] to sell it

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to, and then let them fight it out and let your wife out?

"*A.* Yes, sir.

"*Q.* Your idea was to take your wife out from under this yoke, and let this fellow fight it out, was it not?

"*A.* You bet it was."

It is also apparent from the testimony that Mrs. Hurlbert and Lucas were both cognizant of and parties to this scheme to let Mrs. Langenbacher take up by her money these mortgages then past due, and being pressed for payment, and take her mortgage on long time, so that they could be given leisure in which to assert Mrs. Hurlbert's claim to the premises, or one-half of them. Lucas admits that he bought a chance, and was to run all risks and expenses of the lawsuits necessary to maintain the title of the heirs. He claims that the bargain was to pay each of them $2,500. He paid Mrs. Hurlbert $800 down, and gave her security for the balance. With Carrie Parks he had to trust to her ratifying the purchase when she became of age, and therefore paid her nothing. We think tbey have no equities as against Mrs. Langenbacher.

But as against John Parks, it is different. He has admitted the fraud upon his children, as alleged in the bill, both by his default and his testimony under oath. I am disposed to let him lie in the bed he has made. There is sufficient testimony in the case to sustain the finding or opinion of the circuit judge that this deed was never intended to take effect unless John Parks died of his then illness. But he did not move before his wife's death to have the title restored to him, and he himself positively denies in his testimony that the deed was any other than one intended to take effect at once, and to vest the title absolutely in his wife. And I am thoroughly satisfied that there would never have been any litigation or trouble in this case had it not been for this same

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John Parks. Satisfied, as he now seems to be, that the equitable title to these premises is in the heirs of his wife, he could have deeded the 100 acres to his daughters, as, under such circumstances, it was his duty to have done. But there was an evident desire upon his part to divest innocent purchasers of their titles and securities for which they had paid value, and held for a long time by his active consent; or, at least, he was willing to assist Lucas and his son-in-law in their attempt to defraud such persons as had invested money upon the strength of his title, and at his request, when, if he is to be believed, he knew his title was fraudulent when he sold or mortgaged the premises to them. He is, more than any other person, responsible for the state of things as we find them, and for this litigation. It is equitable that he should in this case reap what he has sown. As against him I think the heirs should prevail.

It is contended very strenuously that the record title, as it stood, was notice to purchasers of the wife's title, and that, therefore, no one could be a good-faith purchaser, as the heirs of the wife were continuously in the possession of the premises; that the record of the mortgage foreclosures, upon which John Parks based his title, showed that the result of those proceedings was but a payment of John Parks' own debts, and that as in equity Parks could not acquire title to the land by purposely or otherwise making default in the payment of his own debts, and bidding the land in as his own, and as the law would consider it a payment of his own debts and a cancellation of the mortgages, the purchaser, after examining the title, and finding it in this condition, was bound to look further, and inquire into the rights of the heirs of the wife. This might be true, so far as the McBlain mortgage was concerned, which was security for the note of John Parks alone, and which it may be

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inferred was signed only by the wife to convey her dower interest. But the mortgage given to William Parks was executed when the title was in the name of the wife, and it was given to secure a note signed by John Parks and Maria T. Parks jointly. And it would, under the circumstances, be presumable from the record that it was her debt instead of his. If so he had as much right to bid in the premises as any one. And, under these circumstances of the record, as said before, we do not think the records were notice to any one that the title was not in John Parks. The possession of the heirs of the wife was always the possession of John Parks. They never occupied the premises, except as they lived as children with their father, until he moved away, and then Hurlbert, who occupied, rented of him. All the conveyances, except the mortgage to Mrs. Langenbacher, were made while Parks occupied the premises, and claimed title. And what Hurlbert and his wife did in the case of Mrs. Langenbacher has been already stated.

My conclusion is that the bill was properly dismissed, and the decree must be affirmed as against all the defendants except John Parks, with costs of both courts. As to the 100 acres, the decree will be modified so that the title to the same will be decreed in the complainants, subject to the payment of the mortgage to Mrs. Langenbacher, which is hereby declared to be a valid lien upon such premises.

The other Justices concurred.

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ERASTUS H. TOWN v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Negligence—Open switch—Absence of lights—Fellow-servants.

1. The closing of a railroad switch, and the removal of the lights, with notice to engineers of passenger trains, who were required to slow up in passing it when in use, that it was abandoned, and that the track was thereafter to be treated as if no switch were there, and its reopening without any notice to such engineers, and without their knowledge, and its use without such lights, make a clear case of negligence against the company, if the presence of such lights would have prevented the running of a passenger train into the switch, which question, in case of conflicting testimony, is for the jury.

2. In such a case it was contended by the company that the absence of the lights was not the proximate cause of the accident; that, if the switch had been locked, the train would have passed in safety; and that the opening or unlocking of the switch was caused either by the intermeddling of a stranger or trespasser, or by the negligence of fellow-servants of the plaintiff; and that he could not recover in either event. And it is held that if the lights would have prevented the accident in the condition in which the switch was, by giving timely warning of the danger, the negligence of the company in reopening it for use without replacing the lights was just as much the proximate cause of the injury as the unlocking and turning of the switch rails; and if they were concurrent causes, the defendant would be liable. 7 Amer. & Eng. Enc. Law, 828.

3. It was further contended by the company that the negligence, if any, in not restoring the lights was that of the section master, a fellow-servant of the engineer, which fact barred a recovery. And it is held that, as the reopening of the switch and its use was by direction of the division superintendent of the company, acting as its agent, it became its duty either to notify the engineer of such reopening or to restore the lights, if not to do both, and a failure so to do would be its negligence, and not that of the section master.

Error to Monroe. (Kinne, J.) Argued November 21, 1890. Decided December 24, 1890.

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Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

I. G. Humphrey, for appellant, contended:

1. In respect to the condition of its roadway and switches, defendant owed plaintiff the same duty as to passengers lawfully on its train; citing *Railroad Co. v. Swett*, 45 Ill. 201; *Railroad Co. v. Welch*, 52 Id. 183; *Mehan v. Railroad Co.*, 73 N. Y. 585; and plaintiff would not have been guilty of contributory negligence even had he known that the track was somewhat out of repair; citing *Eddy v. Mining Co.*, 81 Mich. 548; and, while plaintiff might have been bound to take notice of dangers and defects of which he had knowledge, he was not bound to investigate other departments of work with which he had nothing to do; citing *Devlin v. Railway Co.*, 87 Mo. 545 (28 Amer. & Eng. R. R. Cas. 524).
2. Knowledge of the track-master, section foreman, or others who had charge of the track and switch, of its dangerous condition, was notice to the defendant: citing *Covey v. Railroad Co.*, 86 Mo. 635 (28 Amer. & Eng. R. R. Cas. 382); and if the defendant had knowledge of the increased danger, and did not inform plaintiff, it was negligence, and if it had no such knowledge it was negligent in not ascertaining the true condition; citing *Medina v. Perkins*, 48 Mich. 67.
3. The duty of the defendant to provide switch lights, and properly to guard all switches, has been settled; citing *Railroad Co. v. Daugherty*, 6 Amer. & Eng. R. R. Cas. 139; *Railroad Co. v. Worthington*, 21 Md. 275; and plaintiff had a right to assume that defendant had performed its duty, until notified of its neglect; citing *James v. Mining Co.*, 55 Mich. 335.
4. On the question of fellow-servants, counsel cited *Harrison v. Railroad Co.*, 79 Mich. 409.

A. C. Angell (Ashley Pond, of counsel), for defendant, contended:

1. From the mere fact of injury to a servant there is no presumption of negligence in the master. There must be evidence of negligence connecting him with the injury; citing *Mining Co. v. Kitts*, 42 Mich. 84; *Henry v. Railway Co.*, 49 Id. 495; nor will the jury be allowed to infer from the mere happening of such an accident that the master was negligent; citing *Kuhns v. Railway Co.*, 70 Iowa, 561; *Railroad Co. v. Hughes*, 119 Penn. St. 301.
2. The fact that the switch was open is not itself evidence of the

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breach of any duty owing to plaintiff. The switch was opened either in the course of defendant's business by its servants, or by intermeddlers not in the course of its business. The fact of its being left unlocked by such servants would not alone make defendant liable for the injury. The plaintiff's business daily exposed him to such risks, and he must be held to have assumed them. The engineer and trainmen or switchmen were fellow-servants; citing *Harvey v. Railroad Co.*, 88 N. Y. 481; *Walker v. Railroad Co.*, 128 Mass. 8; *Railroad Co. v. Thomas*, 51 Miss. 637; *Lyon v. Railroad Co.*, 31 Mich. 429; and if some intermeddler, whether a servant or not, opened the switch, not in the course of defendant's business, it would not be liable to the plaintiff under the circumstances here; citing Wood, Ry. Law, 1071; *Deyo v. Railroad Co.*, 34 N. Y. 9; *Railroad Co. v. Thomas*, 51 Miss. 637.

3. The switch was fastened as were all the other switches on the line. It had been safely used for three weeks. Its opening on the night of the accident could not reasonably have been foreseen, and failure to render its opening and the accident impossible is not negligence; citing *Sjogren v. Hall*, 53 Mich. 274; *Burke v Witherbee*, 98 N. Y. 562.

4. If a railroad track becomes unsafe, as from a broken rail or open switch, the only duty resting upon the master is to warn his servant thereof; citing *Henry v. Railway Co.*, 49 Mich. 495; and it is obvious from the testimony that there was no notice to the defendant that this switch was opened, and in an unsafe condition for use, until the injury occurred; nor was it lacking in reasonable diligence in not discovering the fact that the switch was open; and there was no duty to warn the servant here, nor to close the switch before he reached it; citing Thomp. Neg. 971, 992; *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Dolan*, 32 Id. 512.

5. The absence of a light upon the switch stand does not make defendant liable, as it was not the proximate cause of the injury, but the fact that the switch was open was such cause, and one is not liable for an injury of which his neglect is not the proximate cause; citing *Lewis v. Railway Co.*, 54 Mich. 55; *Selleck v. Railway Co.*, 58 Id. 195; and when there are two causes, the injury cannot be attributed to one of them unless without its operation the accident would not have happened; citing *Ring v. Cohoes*, 77 N. Y. 83.

6. No obligation rested on defendant to keep a light on this switch; citing *Railroad Co. v. Gildersleeve*, 33 Mich. 133; *Batterson v. Railway Co.*, 49 Id. 184; *Sjogren v. Hall*, 53 Id. 274; *Hewitt v. Railroad Co.*, 67 Id. 61; nor was the defendant's duty to plaint-

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iff the same as that it owed to its passengers; citing Shear. & R. Neg. § 189.

7. Even if as to plaintiff the lack of the light was evidence of negligence, the fault was that of the section master, a fellow-servant, for which defendant is not liable; citing *Mining Co.* v. *Kitts*, 42 Mich. 34; *Railroad Co. v. Austin*, 40 Id. 247; *Adams v. Iron Cliffs Co.*, 78 Id. 271; and the duty of lighting a lamp and putting it on a switch was obviously not that of a master, and the failure so to do is strictly analogous to the failure to put out a flag as a warning of danger, and a foreman's failure to do this, whereby an inferior servant was injured, was held to be the negligence of a fellow-servant in *Peterson v. Railway Co.*, 67 Mich. 102.

8. Plaintiff was chargeable with notice that the switch was again in use, and the lack of a light does not afford him ground of complaint. He had run by the switch twice each day since it was in use,—nearly or quite three weeks. There had been cars standing on the cross-over constantly during this time. There were two there the night of the accident, close to the main track, which must have been there when he passed north in the morning. He knew the men were at work there on a siding, and, though he says he did not know that the switch was again in use, he was chargeable with notice of it, because by ordinary observation in the course of his duties he could have discovered it; citing *Railroad Co. v. Austin*, 40 Mich. 247; *Illick v. Railroad Co.*, 67 Id. 632; *Hewitt v. Railroad Co.*, Id. 61; *Balle v. Leather Co.*, 73 Id. 158.

MORSE, J. The plaintiff, a locomotive engineer upon a passenger train of the defendant at the time of his injury, brought suit in the Monroe circuit court to recover damages for such injury occasioned by the derailment and wrecking of his train. The court below directed a verdict for the defendant.

The accident was caused by a misplaced switch, and happened on the evening of Sunday, April 29, 1883, in the township of La Salle, in Monroe county, at about 8:30 o'clock. At this place the line of the Lake Shore & Michigan Southern Railway Company runs parallel with, and a few rods west of, the line of the Michigan Central Railroad Company. Some years prior to this time there

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had been built a track to connect the tracks of the two railroads. The switch which caused the accident was formerly used in connection with this cross-over track, for transferring and passing trains from one road to the other. About a year before the accident, this connecting track went out of use, and the rails of the switch were securely spiked, and the switch abandoned, and the target and lights removed. Some three weeks prior to the injury to plaintiff, these spikes were removed, and the switch put into use again. This was done by trainmen who were running local freight trains in at this place, loaded with material for the construction of side tracks on each side of the main track near this switch. It would appear from the testimony of Mr. Sutherland, division superintendent of this part of the road, that this reopening of the switch for the use of these local trains in storing cars upon this cross-over track was authorized by and known to him, but no notice was given to Mr. Town or any of the engineers or conductors on the passenger trains that the switch was in use again. The target and lights were not restored, nor was there any switch-tender, as there had been when the switch was in use before it was spiked.

In the morning before the accident, plaintiff had run his engine and train, consisting of two cars and a smoker, from Toledo to Detroit, as he was accustomed to do, and was returning to Toledo in the evening. His train was behind time, and he was running at the rate of 45 to 50 miles an hour. This was no faster than he was permitted to run, and there seems to be no claim that he was running faster than he ought, if there had been no switch in use there. The switch had been partly opened from some cause, and the rails so moved that the flange of the locomotive wheel struck the end of the easterly movable rail about in the middle. The engine was thrown into

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the ditch and wrecked, and the plaintiff injured. The switch was found to be unlocked. There were two locks upon it,—one, a Michigan Central Railroad lock, which was hanging to a chain and not used, and the other, a Canada Southern Railway lock, was found upon the ground unlocked. Some of the witnesses testified that they examined this Canada Southern lock, and found no marks or bruises upon it; others swear that they examined it the next morning, and found it bruised as if it had been pounded open, and near by they found a fish plate which had brass upon it, appearing thereby to be the instrument with which the lock had been pounded open, the lock being made of brass. Michael Phelan, who was foreman of the gang of men who were grading for the side tracks, testified that the Canada Southern lock was used because he could not open the Michigan Central lock, and the roadmaster had the section men at his request put on the Canada Southern lock, as he (Phelan) had a key to that. It was customary, when they went in or off of this cross-over track, to lock the switch. He is positive that he locked it between 4 and 6 o'clock P. M. when they quit work on the Saturday before this Sunday of the accident, and he did not unlock it afterwards.

The plaintiff testified, as did also the conductor of his train, that after the switch was abandoned they received notice that the lights from that switch would be taken down, that the agent was removed, and the station shut up. There had been before this a station there, called "Otter Creek," where there was an operator and switch-tender. The conductor testified that he had notice from Sutherland, as he supposed, through one J. B. Morford, of the condition of this station, and that it was to be thereafter nothing more than any other piece of track between stations; that he received this information from an officer of the company. The conductor notified the

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plaintiff. Both of them swear that they did not know, until after the accident, that the switch was being used, or that it was not spiked and closed, and they therefore treated the track as if there were no switch there.

There can be no dispute from the record that at first there was a switch at this point, with target and lights and switch-tender as long as it was used. When the transferring of cars ceased, this switch was practically abandoned, and the section master securely spiked and closed it about a year before the accident. The target, lights, and tender were removed. The section master knew of its second use, but the target and lights were not restored until after the accident, and the plaintiff was not notified of its use again. It is disputed that he ever received any notice from any officer of the defendant of the abandonment and closing of the switch, or that he was authorized to treat the track there as if in fact no switch were in existence. It is also claimed that cars were standing on this cross-over track every day for two weeks, and the switch was being used daily for three weeks, before the accident, and he must have known of it. No other notice, however, was shown to him. These disputed questions of fact were matters for a jury.

I think the plaintiff was entitled to go to the jury upon his theory of the case, and the testimony that he produced to support it. It is shown by the rules of the company that an existing switch which is in daily use is recognized as a place of danger, and engineers on passenger trains are required to slow up, and not run faster than 15 miles an hour, in passing one. It is also shown that the lights upon the switch stand are so arranged that, if the switch is out of place and therefore dangerous, the color of the light will at once, and certainly, show the danger. Therefore the closing of this switch, and removing these lights, with notice to plaintiff that

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the switch was abandoned, and the track thereafter to be treated as if no switch were there, and the subsequent opening of the switch without any notice to plaintiff, and without his knowledge, and its use without such lights, if such lights would have prevented the accident, make a case of negligence against the defendant without any fault upon the part of the plaintiff.

There was testimony tending to show that, if there had been lights upon the switch, such lights could have been seen in time, and the train stopped, so as to have prevented any accident. There was also testimony tending to show that the lights could not have been seen in time to prevent the derailment of the train. This dispute was for the jury.

It is contended that the plaintiff cannot recover because the absence of the lights was not the proximate cause of the accident; that, if the switch had been locked, the train would have passed safely by as it was, without any lights; and that the opening or unlocking of the switch was caused either by the intermeddling of some stranger or trespasser, or by the negligence of fellow-servants of the plaintiff; that he could not recover in either event. But I do not so understand it. If the plaintiff's theory be true, the lights would have prevented any accident in the condition in which the switch was, as they would have warned the plaintiff in time to avoid the danger; so the negligence of the defendant in opening this closed switch for use, without any lights to warn plaintiff of the presence of the switch or its danger, was just as much the proximate cause of the injury as was the turning of the switch rails. And it certainly was a concurrent cause, and the injury in any event, under the plaintiff's theory and evidence, was occasioned partly through the negligence of the defendant as to the switch lights, and partly by the condition of the switch rails, in which

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case the defendant would be liable. 7 Amer. & Eng. Enc. Law, 828. It was the duty of the defendant to have notified the plaintiff of the opening of this switch, or, in the absence of such notice, to have placed over it the customary warning signals, when it had before that time notified him of the practical removal of the switch, and authorized him to treat that portion of the road as if no switch were there, and which he could have done in safety if the defendant had not removed the spikes and reopened it for use.

It is also contended by defendant's counsel that the negligence, if any, in not restoring the switch lights was the negligence of the section master, who was a fellow-servant of the plaintiff, and therefore the plaintiff cannot recover for his injury. But this negligence in using the switch again without notice to the plaintiff, and in not restoring the lights, was not the negligence of the section master. The defendant company abandoned the switch, and shut up the station, and removed the lights in the first place. It was the division superintendent, and not the section master, who directed or authorized the removal of the spikes and the second use of the switch; and in doing this he was the agent of the company. It then became the duty of the defendant, not of the section master, except as he acted under the direction of the company, either to notify the plaintiff that there was a switch in use there, or to restore the lights, if not to do both, and the negligence in not doing so would be the negligence of the defendant rather than of the section master.

The judgment of the court below is reversed, with costs, and a new trial granted.

The other Justices concurred.

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ATTORNEY GENERAL, EX REL. JAMES HART ET AL., v. LAWRENCE CAIN ET AL.

Quo warranto—Officers—Municipal police—Information—Misjoinder of respondents.

1. The office of policeman, the incumbent of which is subject to the orders and direction of the common council of a city, and to removal at their discretion, does not rise to the dignity of being entitled to the notice of the Attorney General by *quo warranto* proceedings. *People v. DeMill*, 15 Mich. 182; *Portman v. Commissioners*, 50 Id. 258.
2. Respondents cannot be joined in *quo warranto* proceedings where the title of one to the office into which they are charged with intruding does not depend upon that of the other.

Quo warranto. Submitted on briefs December 5, 1890. Proceedings dismissed December 24, 1890.

Information in the nature of a *quo warranto* to test the right of respondents to act as policemen of the city of Adrian. The facts are stated in the opinion.

B. W. Huston, Attorney General (*Watts & Smith*, of counsel), for relators.

Walter S. Westerman (*F. A. Baker*, of counsel), for respondents.

MORSE, J. This is a proceeding by *quo warranto*. The information is in the usual form, and charges:

1. That, by virtue of the charter, ordinances, rules, and regulations of the city of Adrian, four policemen were authorized for said city, and only four.

2. That the four relators had been duly appointed to hold and perform the duties of such policemen; that each had duly qualified and filed his bond, as such officer;

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and that they are still lawfully entitled to hold said positions.

3. That the four respondents had, without any authority of law, intruded themselves into such positions, and continued to hold the same, without any warrant of law.

Respondents demur, and assign six special causes of demurrer, viz.:

"1. The alleged office of policeman of the city of Adrian is not an office created by the State.

"2. The alleged office of policeman of the city of Adrian is not an office for which an information in the nature of a *quo warranto* can be maintained.

"3. The position of policeman of the city of Adrian is not an office.

"4. The four defendants in this case cannot properly be proceeded against in one information.

"5. The case is not one in which the relators can establish their own titles to said alleged offices of policemen of the city of Adrian.

"6. There is no such office as the four policemen of the city of Adrian."

The case is submitted to us upon this demurrer, which the Attorney General contends is not sufficient in law.

The provisions of the charter of the city of Adrian (Act No. 384, Local Acts of 1887), as to police, are as follows:

The common council may, by ordinance, provide for a police force, and for the appointment by the mayor, by and with the consent of the council, of such number of policemen and night-watchmen as they may deem necessary for the good government of the city; and may authorize the appointment of special policemen by the mayor, "from time to time, when, in his judgment, the emergency or necessity may so require; and may provide for and appoint subordinate officers for the police and night-watchmen." Section 148.

"The council may make and establish rules for the regulation and government of the police, prescribing and defining the powers and duties of policemen and night-watchmen, and shall prescribe and enforce such police regulations as will most effectually preserve the peace and

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good order of the city. * * * And the mayor is hereby authorized, whenever he shall deem it necessary for the preservation of peace and good order in the city, to appoint, and place on duty, such number of temporary policemen as, in his judgment, the emergencies of the case may require; but such appointments, unless made in accordance with some ordinance or resolution of the council, shall not continue longer than three days." Section 149.

The city marshal, subject to the direction of the mayor, as chief of police, has superintendence and direction of the police, subject to the regulations of the council. Section 150.

"The mayor may suspend any policeman or night-watchman for neglect of duty, misconduct, or other sufficient cause, and the council may remove from office any policeman appointed thereto at any time." Section 152.

It would seem that the number of policemen, their term of office, and their removal from office, is entirely within the will of the common council of the city. They may be appointed for one day, or for a year, and may be removed, at any time, without cause shown, from their position, by the common council. These persons, policemen and night-watchmen, are not mentioned in the city charter as city officers, and there is nothing in any of its provisions warranting the claim that they are to be considered as such officers. They are not required, unless it be by ordinance, to take any oath, or file any official bonds.

It is stated in the brief of relators, and not denied by the respondents, that the ordinance pertaining to city police provides:

"SECTION 1. *The City of Adrian ordains,* that a city police is hereby established, to consist of the city marshal, who shall be chief of police, and such number of policemen as the common council from time to time determine.

"SEC. 2. The policemen shall be appointed by the

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mayor and city marshal, by and with the advice of the common council. Every policeman, before entering on the duties of his office, shall take the oath of office prescribed by the Constitution of this State, and shall also (except in the case of special policemen appointed for temporary duty) give bond to the city of Adrian in the sum of one thousand dollars, with good and sufficient sureties, to be approved by the mayor, conditional for the prompt and faithful performance of the duties of his office, and shall file such oath and bond with the city clerk."

We shall take it for granted that this is the ordinance. It is contended by counsel for relators that sections 18 to 21 of said charter, corresponding with How. Stat. §§ 2428, 2430, 2433, 2436, apply to these policemen as appointed officers of the city. These sections are as follows:

"SEC. 18. Appointments to office by the council, except appointments to fill vacancies, shall, unless otherwise provided, be made on the first Monday of May, in each year; but appointments which, for any cause, shall not be made on that day may be made at any subsequent regular meeting of the council.

"SEC. 19. The mayor, city marshal, city clerk, city treasurer, city collector, street commissioner, supervisors, and constables shall hold their offices for the term of one year from the second Monday in April of the year when elected, and until their successors are qualified, and enter upon the duties of their offices. One justice of the peace shall be elected annually for the term of four years from the fourth day of July next after his election.

"SEC. 20. At the first election of aldermen in new wards, one alderman shall be elected in each ward for the term of one year, and one for the term of two years. The term of each shall be designated on the ballots cast for him. After the first election, one alderman shall be elected annually in each year for the term of two years from the second Monday in April in the year when elected, and until his successor shall be qualified, and enter upon the duties of his office.

"SEC. 21. All other officers appointed by the mayor or council, except officers appointed to fill vacancies in

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elective offices, shall hold their respective offices until the first Monday in May next after such appointment, and until their successors are qualified, and enter upon the duties of their office, unless a different term of office shall be provided in this act, or by ordinance duly enacted."

And that, consequently, as we deduce from their argument, they must be appointed on the first Monday in May, or at some subsequent regular meeting of the council, and hold their offices until the first Monday in May next after such appointment, and until their successors are qualified, and enter upon the duties of their office. We are satisfied that the policemen and night-watchmen do not come under these provisions of the statute at all, and that their tenure of office is regulated by the will of the common council solely.

We do not think the position of policeman, under these circumstances, is such an office as authorizes the Attorney General to file an information by *quo warranto* in this Court to test the title to the position. It was said in *People v. DeMill*, 15 Mich. 182, that,—

"There are grades of positions denominated 'offices' which do not rise to the dignity of being entitled to the notice of the Attorney General by information." See, also, *Throop v. Langdon*, 40 Mich. 686.

It is certain that the intent of the charter is that these policemen shall be subject to the orders and direction of the common council, and that such council has the power at any time to remove them. It would, therefore, be useless for the Attorney General, on the relation of any one of them, to undertake to determine who was entitled to the position, as, before the matter was judicially determined, the council could, at once and forever, end the controversy by removing one and appointing the other, or by ignoring both contestants, and putting a third person in the place. It was held in *Portman v.*

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Commissioners, 50 Mich. 258, that the Superintendent of Fisheries of the State of Michigan was not an "officer," within the meaning of the Constitution and laws of this State. This opinion was founded on the fact that he was subject to the orders and directions of the Board of Fish Commissioners, and removable at their pleasure.

We are also of the opinion that in any event the four respondents in this case could not properly be joined in one information. The title of one does not depend upon the title of any other, and, if it were a case for procedure by *quo warranto,* each would be entitled to be proceeded against singly.

The demurrer is sustained, and the proceedings dismissed, with costs against the relators.

The other Justices concurred.

84 228
94 514
94 518

FRED A. MAYNARD v. THE BOARD OF CANVASSERS OF THE FIRST REPRESENTATIVE DISTRICT OF KENT COUNTY AND CORNELIUS L. HARVEY, CLERK.

Constitutional law—Cumulative voting act of 1889.

Act No. 254, Laws of 1889, which provides for *cumulative* voting in districts entitled to more than one Representative in the State Legislature, is unconstitutional.

Mandamus. Submitted December 2, 1890. Denied December 24, 1890.

Relator applied for *mandamus* to compel respondents to declare and certify his election as Representative to

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the State Legislature. The facts are stated in the opinion.

T. J. O'Brien (C. A. Kent, of counsel), for relator.

Uhl & Crane (F. A. Baker, of counsel), for respondents.

CHAMPLIN, C. J. The Legislature, at its biennial session of 1889, passed an act numbered 254 (3 How. Stat. p. 2835), entitled—

"An act relating to the election of Representatives to the State Legislature in districts where more than one is to be elected."

Sections 1 and 2 of said act read as follows:

"SEC. 1. *The People of the State of Michigan enact,* That, in all elections of Representatives to the State Legislature in districts where more than one is to be elected, each qualified elector may cast as many votes for one candidate as there are Representatives to be elected, or may distribute the same among the candidates as he may see fit, and the candidates highest in votes shall be declared elected.

"SEC. 2. The name or names of the person or persons for whom such elector intends to vote for as a Representative to the State Legislature shall be written or printed, or partly written and partly printed, upon the ballot containing the names of the persons to be voted for for other State offices, and opposite the name of each person voted for as a Representative to the State Legislature there shall be written or printed in plain figures the number of times the elector intends to vote for said person in whole numbers: *Provided,* That in case the total of the numbers opposite the names of the persons voted for exceed the total number of Representatives to be elected from that district, the excess shall be taken from the person so voted for lowest on the ticket, and, should there still be an excess, then from the next above, until the numbers correspond."

Section 3 repeals all laws and parts of laws inconsistent

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therewith. This act was approved by the Governor on July 3, 1889.

The city of Grand Rapids comprises one election district, and is entitled to elect two Representatives to the State Legislature. It is known as "The First Representative District." Fred A. Maynard, the relator, is an elector residing in that district, and in his petition, duly verified, in which he prays for a *mandamus*, states that on November 4, 1890, there were in said election district 14,272 qualified electors duly registered according to law, and entitled to vote for the officers then to be elected, and to elect two Representatives in the State Legislature; and that under the laws of this State each of said electors was entitled to cast his vote for two Representatives in the State Legislature, one vote for each, or to cast for one person for Representative in said Legislature two votes, as the elector might see fit; that at said election 13,000 of said qualified electors voted for the several officers to be elected; that at said election 5 persons were voted for as Representatives, including relator; that the returns from the several voting precincts have been duly returned and filed; that such returns show that, for the office of Representative, relator received 8,368 votes; Mr. White, 7,358; Mr. Hayward, 7,074; Mr. Thaw, 623 votes; and Mr. Belden, 1 vote; that the inspectors in several of the precincts counted and returned the cumulative votes for relator as single votes only; that the board of district canvassers met, and from the returns made a statement that, for said office of Representative, White received 7,258 votes; Hayward, 7,074 votes; Maynard, the relator, 5,374 votes; Thaw, 623 votes; and Belden, 1 vote,—and determined that White and Hayward were elected; that relator had the greatest number of votes, and was duly elected Representative; that he bases

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his claim to election upon the legality of said cumulative votes, and avers that if every ballot having his name only for Representative as aforesaid, with the statement "two votes" opposite the name as aforesaid, shall be counted as two votes, then he received more than 10,000 votes for said office, and this exceeded the votes given for any other candidate. He admits that, if said votes cannot be counted for him cumulatively,—that is, if every ballot having the statement "two votes," as aforesaid, for him is legal only as one vote, and must be so counted,—then the said White and Hayward received a greater number of votes for Representative at said election than the relator. He prays for a *mandamus* to compel the board of district canvassers to declare him elected, and that the chairman and clerk certify the same.

The board of canvassers have answered, in which they deny that the cumulative votes cast for relator are legal, and deny that they should be counted. They set up that, previous to the election held on November 4 last, a convention of the Democratic party of the first representative district met, and placed in nomination Arthur S. White and John W. Hayward for the office of Representatives in the State Legislature, to be voted for upon a general ticket at the said election, and their names were so printed upon the tickets of that party; that a convention of the Republican party also met previous to the election, and placed in nomination only one person as Representative, and that person was Fred A. Maynard, the relator, and his name was printed upon the tickets of that party, with the words "two votes" opposite said name; that the ballots used at said election were furnished by the Secretary of State of the State of Michigan for that purpose; that the returns from every precinct show a large excess of votes cast over the number of voters listed in the poll-lists. These poll-lists show that 13,164 electors voted in the

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city, and the return of votes shows that 23,799 votes were cast,—an excess of 10,635 votes. The board claim that the act above recited is unconstitutional and void, and, so considering it, they disregarded it, and declared those persons elected who had received the highest number of votes, counting one vote to a ballot.

At the time of the argument, petitions for *mandamus* had been filed on behalf of four persons who claim to have been elected by cumulative votes to the office of Representative in the city of Detroit, and counsel representing the parties in interest there were permitted to present their views upon the constitutionality of the law.

There has been in the latter half of the present century a growing desire to secure to minorities a proportionate representation in legislative and corporate bodies, and from time to time schemes have been advocated by those who have desired to bring about what they claim as a reform in existing modes of election to secure to the minority a just and proportionate representation. These schemes may all be reduced to four well-recognized classes, viz.:

1. The "restrictive," which requires a certain number to be elected on one ticket, and prohibits any elector from voting for the whole number to be elected. Thus, if four are to be elected, no one can vote for more than two.

2. The "cumulative," which requires three or more to be elected, and permits the elector to cast as many votes as there are persons to be elected, and to distribute such votes among the candidates as the elector may choose.

3. The "Geneva," "free vote," or "Gilpin" plan. By this plan the districts are required to be large, and each party puts in nomination a full ticket, and each voter casts a single ballot. The whole number of ballots having been ascertained, that sum is divided by the number of places to be filled, and each ticket is entitled to the places in proportion to the number of votes cast by it, taking the persons elected from the head of the tickets.

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This plan doubtless comes the nearest to a proportional representation of the minority of any plan devised which is practical for popular elections. It was originated by Mr. Gilpin in 1844, who advocated it in a pamphlet published in Philadelphia. It has never been adopted in this country, but has become the *liste libre* of Geneva, and is said to work well in Switzerland.

4. The "Hare" plan, or "single vote." This method is too intricate and tedious ever to be adopted for popular elections by the people. It requires successive counts and redistribution of the votes until an election is reached.

The effort to realize minority representation by the use of the restrictive method was tried in Ohio, under an act passed in that state. The law was declared unconstitutional by the supreme court. *State v. Constantine*, 42 Ohio St. 437. That court held that it was the right of every elector to vote for every candidate or person to fill the offices provided by law to be elected by vote of electors, and a law which said that no person could vote for more than two of the four persons to be elected took away from the elector a substantial right guaranteed to him by the constitution.

In Pennsylvania, Mr. Buckalewe for many years advocated the adoption of the system of cumulative voting in order to secure minority representation; and, mainly through his efforts, in 1874 a provision was inserted in the constitution of Pennsylvania (article 16, § 4) permitting stockholders in corporations to vote cumulatively upon the shares of stock. It was held in *Hays v. Com.*, 82 Penn. St. 518, that, as to corporations existing at the time the constitutional provision was adopted, the constitutional provision could not apply, because it interfered with and affected existing vested rights.

In 1870 the state of Illinois adopted a new constitution, which contains this provision (article 4 §§ 7, 8):

"The house of representatives shall consist of three

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times the number of the members of the senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit, and the candidates highest in votes shall be declared elected."

In Nebraska (article 11, § 5), in West Virginia (article 11, § 4), in Missouri (article 12, § 6), and in California (article 12, § 12), by constitutional enactment, cumulative voting is permitted upon stock in corporations. So far as I am aware, Illinois is the only state which has tried the experiment of cumulative voting for members of the legislature. It is significant that all the states which have authorized such voting have submitted it to the people for their adoption as a part of the fundamental law. In Ohio the legislature endeavored to authorize it without a constitutional amendment, and it was declared unconstitutional. In New York there has been legislation sanctioning such voting in certain cases; and, although the question has been twice before the court of appeals of that state, that court found a way of disposing of the cases in which the questions were raised without passing upon the constitutionality of the law. *People v. Crissey*, 91 N. Y. 616; *People v. Kenney*, 96 Id. 294.

Such has been the action of other states. Is the law contrary to the Constitution of this State? The provisions of the Constitution bearing upon this question are those relating to elections, and those to the election of Representatives. Article 7, § 1, prescribes the qualification of electors. It says: "In all elections, every male citizen * * * shall be an elector, and entitled to vote." Section 2 provides that "all votes shall be given by ballot, except for such township officers as may be author-

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ized by law to be otherwise chosen." Article 4, § 2, provides that the Senate shall consist of 32 members. They shall be elected for two years, and by single districts. Each district shall choose one senator. No county shall be divided in the formation of Senate districts, except such county shall be equitably entitled to two or more Senators. Section 3 provides that the House of Representatives shall consist of not less than 64, nor more than 100, members. Representatives shall be chosen for two years, and by single districts. No township or city shall be divided in the formation of a Representative district, but, when any township or city shall contain a population which entitles it to more than one Representative, "then such township or city shall elect, by general ticket, the number of Representatives to which it is entitled." Section 34 provides that the election of Senators and Representatives shall be held on the Tuesday succeeding the first Monday of November biennially. The first Constitution, adopted in 1835, was substantially the same, except that elections were annual. Senators and Representatives were not required to be elected by single districts.

Laws were immediately enacted providing for elections, and the manner of conducting them, under which every elector was entitled to express his will as to the choice of rulers, and who should represent him in the Legislature, by depositing a ballot upon which his choice was indicated, containing the name of one person for one office; and if two ballots were found folded together in the box, or if any ballot included more than one name for any office, they were destroyed as fraudulent and illegal, and not counted. These laws were in force at the time of the adoption of the present Constitution, and have been continued in force ever since. They afford a practical construction of the right of every elector to vote for every

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officer to be elected, and that his vote shall be of equal effect with, and no more than, the vote of every other elector for every officer to be elected. Laws were passed, and exist to-day, punishing any elector for voting more than once for any candidate. Repeaters and ballot-box stuffers were condemned under severe penalties. Such has been the Constitution and practical operation under it for more than half a century. More than this, such has been the practice by all the states of our Union under constitutional provisions similar to ours.

It was conceded upon the argument by counsel who appeared to defend the constitutionality of this law that, when the Constitution was adopted, no such thing was thought of as cumulative voting; that it is a recent invention; and that our people, when they adopted the Constitution, had no thought of investing the Legislature with the right of enacting a cumulative voting law; but they contend that, no matter what has been the uniform custom, the Legislature has the power to enact a cumulative voting law, or any other law that is not expressly or by plain implication forbidden them to do by the Constitution. The rules for construing the Constitution of this State have often been passed upon by this Court, and certain principles recognized in the performance of this duty. Thus, it has been said that, before an act of the Legislature can be declared by the courts unconstitutional, it must be prohibited by the express words of that instrument, or by necessary implication; and some members of the Court have gone so far as to say that, before you can declare the act void, you must be able to lay your finger upon the very language of the Constitution which prohibits the exercise of the power of the Legislature to enact the law. *Scott v. Smart's Ex'rs*, 1 Mich. 295; *People v. Gallagher*, 4 Id. 244; *Sears v. Cottrell*, 5 Id. 251; *Tyler v. People*, 8 Id. 320; *People v. Blodgett*, 13 Id.

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127; *People v. Mahaney*, Id. 481. The rule above announced has not been unquestioned, and in almost every case the result announced failed to secure the unanimous concurrence of the members of the Court.

In reaching a conclusion as to whether an act of the Legislature is prohibited by the express language or by necessary implication, and to enable the Court correctly to construe the Constitution, certain rules have been laid down for its guidance which will be now referred to.

"Constitutions," says Mr. Justice COOLEY in the case of *Bay City v. State Treasurer*, 23 Mich., at page 506, "do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberate action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies, standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

Chief Justice CHRISTIANCY, in *Kennedy v. Gies*, 25 Mich. 83, said:

"In legal reasoning, and in the construction of constitutions and statutes, we are often compelled to content ourselves with conclusions somewhat less certain than those involved in mathematical axioms, because neither conventions nor legislatures always use language with mathematical accuracy, and neither the human mind nor human affairs will always submit to merely mathematical rule. For various reasons, and upon various grounds, exceptions or qualifications are sometimes implied, though not expressed."

The learned Judge then instances cases where, if the Legislature should give to courts jurisdiction to try

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cases involving certain amounts or of a certain character, such act of the Legislature would not give such judge the right to try his own cause. In that case, also, he held that it was legitimate to inquire whether there was not something in the nature of the provision itself, considered in connection with the legislative and judicial history of the State, and the action of the convention which framed it, which might furnish a satisfactory inference that such an exception was intended, and should therefore be implied.

In *People v. Harding*, 53 Mich. 485, Mr. Chief Justice COOLEY said:

In seeking for the real meaning of the Constitution, "we must take into consideration the times and circumstances under which the State Constitution was formed, the general spirit of the times, and the prevailing sentiments among the people. Every constitution has a history of its own, which is likely to be more or less peculiar, and, unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the Court must keep in mind when called upon to interpret it, for their duty is to enforce the law which the people have made, and not some other law which the words of the Constitution may possibly be made to express."

In the case of *Attorney General v. Detroit Common Council*, 58 Mich. 216, some views of our late associate, Mr. Justice CAMPBELL, are of special significance as bearing upon the question under consideration. He said:

"It is needless to explain that under that instrument the whole scheme of government, in every department, depends upon the action of the qualified voters in their election districts. * * * All legislation imposing restraints or conditions upon voting must conform to the other clauses and provisions of the Constitution. No part of that instrument can be allowed to override or destroy any other part. * * * There is nothing in the Constitution which permits the Legislature, under

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the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. And as the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same, in substance, everywhere. The machinery of government differs in its details in cities, villages, and townships; and of course it is unavoidable that there must be some differences in methods and officers to administer the election laws. But it cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities in the exercise of their voting franchises."

In the light of these decisions there is in my mind no doubt that the act under consideration is unconstitutional. The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than it does in a democratic. When there are more than two candidates for the same office placed in nomination, it may often happen that one candidate, although he may receive more votes than any other, may not receive a majority of the votes cast. Still the principle of majority rule is preserved, for in such case more of the electors prefer such candidate than they do any other particular candidate to represent them. It is the constitutional right of every elector, in voting for any person to represent him in the Legislature, to

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express his will by his ballot; and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for in that instrument.

The political history of the State from 1836 to the present time shows that every elector has an equal voice in the choice of those who shall represent the people in the Legislature. It is implied in those provisions of the Constitution which require that Representatives in the Legislature shall be chosen by ballot, and by single districts. By these provisions every elector expresses his wish by ballot, and a single vote is implied. It is implied in those provisions of the Constitution that declare that every male citizen of 21 years of age, and possessing the qualifications prescribed, shall be entitled to vote at all elections; and that all votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen. What do these provisions express? What is the meaning of the word "vote?" It means, according to Worcester,—

"Suffrage; voice or opinion of a person given in some matter which is commonly to be determined by a majority of voices or opinions of persons who are empowered to give them; the wish of an individual in regard to any question, measure, or choice, expressed by word of mouth, by ballot, or otherwise; that by which the will, preference, or opinion of a person is expressed; a ballot."

See, also, Bouv. Law Dict. tit. "Vote." And what is meant by the word "elections," used in this article of the Constitution? Bouvier defines "election" as signifying the choice which several persons collectively make of a person to fill an office or place. This is the most usual

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acceptation of the term. We think, also, that he expresses the common opinion of the public in the fourth paragraph under this title, where he says:

"One of the cardinal principles on the subject of elections is that the person who receives a majority or plurality of the votes is the person elected. Generally, a plurality of the votes of the electors present is sufficient, but in some states a majority of all the votes is required. Each elector has one vote."

Giving to the language of the Constitution its ordinary signification, it declares the principle that each elector is entitled to express his choice for Representative, as well as all other officers, which is by his vote, and the manner of expressing such choice is by ballot. When he has expressed his preference in this manner, he has exhausted his privilege; and it is not in the power of the Legislature to give to his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice. As to members of the Legislature, county or township officers, the Constitution nowhere in express terms prohibits the Legislature from enacting a law that the certificates of election shall be issued to the person having the least number of votes. This is practically what is asked for in this case, for relator admits that he has received a minority of the votes cast, if each elector can cast but one vote for a candidate. No one would contend that a law declaring the person who received the least number of votes elected to an office would be a constitutional and valid law; and yet we cannot lay our finger upon the clause prohibiting in terms such legislation.

It is true, the Constitution does not prohibit the Legislature by express language from concocting some scheme by which the equality of the electors in the choice of Representatives may be impaired or defeated. There is

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nothing in the Constitution which by express language prohibits the Legislature from enacting a law providing that such electors as appear by the assessment roll of the preceding year to have been assessed $1,000 and upward shall have an additional vote for each $1,000 for which they are assessed and pay taxes on. This would permit every elector qualified under the Constitution to vote at least once, and others to vote as many times as they were assessed $1,000 upon the assessment roll. It requires no argument to show that such legislation would defeat the object of the elective franchise, which is that every elector's franchise is of equal value to that of every other elector, and it would subvert the will of the people as expressed through the ballot. And such is the case before us. No reason can be given why, under our Constitution, one elector should be entitled to vote twice or seven times for any particular person to represent him in the Legislature, when any other elector, who desires to exercise the right which the Constitution gives him to vote for every person allowed by law to represent him in the Legislature, is permitted to vote but once. The choice of the elector, as expressed by the ballot, who "plumps" his vote under this law is equal to the choice of two electors in Grand Rapids, or to seven in Detroit, who exercise the right which the Constitution gives them to vote for every candidate to be chosen. It is no answer to say that he, too, may forego the right of an elector to vote for the number of Representatives which the law permits in cities entitled to more than one Representative; for to do so he is compelled to relinquish a constitutional right, and his right as an elector is in this respect abridged. What different in principle or in result is this law, which permits one elector to cast more than one vote for a candidate, from the act of the person who

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stuffs a ballot-box with more votes for a particular candidate than there were electors voting for him? The only difference is that in one case the will of the majority is overcome and defeated under the forms of law, and in the other without law. Both are frauds upon the rights of the majority of the electors; both alike strike down the constitutional safeguards of the people; both are subversive of a free representative government.

It must be conceded that the Constitution, by implication, prohibits cumulative voting in single districts; that is, where but one Representative can be elected. The prohibition is equally strong in cities or towns where, by the Constitution, more than one Representative can be elected. With regard to such municipalities, the Constitution declares that such town or city shall elect by general ticket the number of Representatives to which it is entitled. Here the method of election is prescribed, and cannot be ignored. What is meant by the term "general ticket?" In the connection in which the language occurs, the term "general ticket" is opposed to "partial" or "special," and signifies that the whole number of Representatives to which the town or city is entitled shall be placed upon the ticket to be voted, thereby constituting a "general ticket." This signification corresponds with the primary meaning of the word "general" as defined by lexicographers. It is, moreover, consistent with the provision for electing Representatives when only one is to be chosen, making the whole proceedings uniform throughout the State. Any other construction, or any construction of the Constitution which will permit an elector to vote more than once for the same person to be a Representative, would destroy that uniformity of the right of every elector, wherever he may reside in this State, to cast one vote, and but one vote, for each Representative for which he is entitled to vote; and as was said by Mr.

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Justice CAMPBELL in the case of *Attorney General v. Detroit Common Council*, 58 Mich. 216,—

"It cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities in the exercise of their voting franchises."

The law under consideration does create substantial and serious differences between the rights of the electors in Grand Rapids and in Detroit and those of other parts of the State, in the exercise of their voting franchise. In Grand Rapids it defeats the will of a majority of the electors, and, instead of securing a minority representation, it gives an equal representation with the majority. In Detroit, as stated upon the argument of the learned counsel, instead of that municipality being represented in the Legislature by those electors who constituted a majority who voted for Representatives, and, if no elector had voted more than once for any candidate, such majority would have elected seven Representatives, the minority of the electors voting have elected four out of the seven by "plumping" their votes in different parts of the city. Here the will of the majority has been defeated and overridden by votes which do not represent the will of an individual elector in each case, but which do represent, if the law is constitutional, a legal stuffing of the ballot-boxes with false votes. In this State, no matter by what means accomplished, whether because a candidate who receives a majority of the votes is ineligible, or whether an elector votes more than once for a candidate, no person is elected who receives only the vote of a minority of the electors voting. *People v. Molitor*, 23 Mich. 341. Although the Constitution requires Representatives to be elected upon a general ticket in the cases specified, yet every elector is not obliged to vote for every office to be filled, or for every person on the ticket. He may vote for one or more, but

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he cannot vote more than once for any one person, for the reason before stated.

Under ordinary circumstances, where a person claims an election to a legislative body which is the sole judge of the election and qualifications of its own members, we should not grant a writ of *mandamus* to compel the canvassing board to reverse its action. *Sherburne v. Horn*, 45 Mich. 160. And while we adhere to the doctrine laid down in several of our previous decisions, that the duties of a canvassing board are purely ministerial, yet, feeling, as we do, that the law is unconstitutional under which the relator claims to have been elected, we should stultify ourselves to command even a ministerial board to observe it. Happily, we are relieved from such dilemma by the honorable course of the relator, who has set up the fact in his petition that he is not entitled to the certificate unless the votes can be counted for him cumulatively, and that a less number of electors voted for him than for those whom the canvassing board have declared elected, and his counsel frankly states to us that unless the cumulative voting law is valid his client has no claim and asks no relief. We have also a precedent from Ohio, where the duty of the canvassing board is ministerial, but who refused a certificate of election to an office claimed to be vacant, but which they deemed not vacant. The supreme court held that although the duties of the canvassing board were ministerial, and they had no right to consider the question of vacancy, yet the court would consider it, and not compel the performance of an act that was useless. *State v. McGregor*, 44 Ohio St. 628 (10 N. E. Rep. 66).

If the people of this State desire to provide for some different means to secure minority representation than that which is in a measure secured by the single district system under the present Constitution, they must do so,

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through an amendment to that instrument, by which a proposition so vitally interesting to them may be passed upon by the popular vote; but it is to be hoped that, when a plan is submitted to them, it will not be the system of cumulative voting, which obtains such unequal and unjust results, overturning, in many instances, the will of the majority, and concerning which Mr. Horton, in the Penn. Monthly for June, 1873, said:

"The larger the district, the more dangerous the peculiarities of this system. Were it tried on such a scale as that of congressional elections in Ohio, anything like fairness or proportionality would at first be impossible. Tending, as it plainly must, if unrestrained, to make representation fluctuating and disproportionate. It would eventually compel the tightening of the already oppressive bands of party discipline. In general, the scale which, under the present district system, tends now to a majority, and now to a minority, would be permanently weighed down in favor of a minority."

If proportional representation is desired, the Geneva or Gilpin plan approaches the nearest to exact justice. But every plan yet devised is open to serious objection. Were the law under consideration a valid emanation of legislative power, we should not offer any suggestions as to its wisdom or expediency, and what we have said is in response to the argument advanced that there was a widespread and prevailing desire for some sort of minority representation.

Upon consideration of the whole record, the application must be denied.

MORSE and LONG, JJ., concurred with CHAMPLIN, C. J.

GRANT, J. The respondent declined to canvass and count the votes for Representatives in the Legislature in the city of Grand Rapids, and to issue a certificate to relator, according to Act No. 254, Laws of 1889, which provides for cumulative voting in certain cities entitled

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to more than one Representative. This refusal is based upon the unconstitutionality of the act. The relator thereupon presented his petition to this Court to compel the canvassing of the votes, and the issuance of a certificate to him.

At the threshold of this controversy is an insurmountable objection to the position taken by the respondent, if it were insisted upon. The sole duty of the canvassers under the law is to examine the original statements certified to them by the several boards of inspectors of election, or certified or corrected copies thereof, and from them to ascertain the number of votes cast for the different officers, and to make statements thereof, and issue certificates accordingly. They have no discretion, no judicial power or functions, and no ministerial functions, except in so far as the word "ministerial" means "clerical," which is one of its definitions given by Webster. Their functions, therefore, are purely clerical. The relator, upon the face of the returns, was entitled to a certificate of election. The real question here is, who was elected Representative? The proceeding by *mandamus* is not the proper remedy to try the title to an office. This can only be done, finally and conclusively, by *quo warranto* proceedings. *Frey v. Michie*, 68 Mich. 323. In my judgment, it was never contemplated by the Legislature that the board of canvassers should possess any other power than to canvass the returns and to declare the result. This does not determine the title to the office. The certificate is only *prima facie* evidence of title, throwing the burden of proof upon him who contests. *People v. Van Cleve*, 1 Mich. 363; *Sherburne v. Horne*, 45 Id. 160. The canvassers have no right to shift this burden of proof by withholding the certificate, or issuing it to another.

But it is said that constitutional questions have often

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been raised and decided by this Court in *mandamus* proceedings. This is true where personal and property rights are involved, and great inconvenience and damage would result if prompt action were not taken. In such case the public officer or body charged with the performance of duty may either decline to act on the ground of the alleged unconstitutionality of the law, or he may proceed. In either event *mandamus* will lie,—to set him in motion in the one case, and to restrain him in the other. But this does not apply to cases where the duty of the officer is only clerical or ministerial, and the law provides an ample remedy afterwards to test the validity of his action, and that, too, without any inconvenience or damage. In such case the officer must perform his duty, and leave the parties interested to contest the result in the proper forum and by the proper proceeding. He should not, in such case, be heard to plead the unconstitutionality of the law as an excuse for his refusal.

The result of the respondent's action in this case is to shift the burden of proof to one upon whom the law in such cases does not place it. It can make no difference that that burden involves the constitutionality of the law, rather than a question of fact. This is not the proper proceeding, therefore, to raise the constitutionality of this act of the Legislature; and this Court should, in my judgment, decline to determine it in all cases where it is not expressly waived by the relator. This the relator has done, and upon that ground alone I consent to a determination of the main question. Upon this question I fully concur in the result reached by my Brother CHAMPLIN, and in his reasons therefor.

CAHILL, J., (*dissenting*). I am unable to agree with my brethren in the conclusion that Act No. 254, Laws of 1889, commonly called the "Cumulative Voting Law,"

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is unconstitutional. The law requires me to give the reasons for my dissent. In doing so, as the case is one that in a special sense concerns the whole people, I shall be justified in stating some of the elementary principles that underlie the question to be decided.

And, first, I may state what *is not* to be decided. This Court has no right to criticise or discuss the wisdom, the policy, the fairness, or abstract justice of an act of the Legislature. The Supreme Court is not the guardian of the Legislature, to see that it does no wrong. The Legislature, when acting within the scope of its constitutional powers, is under no guardianship, and is answerable to no one but the people. The only duty that devolves upon this Court in connection with legislation is to see that the Legislature does not violate the Constitution. Speaking generally, the Legislature may do this in one of three ways:

First. Its action may be in excess of the legislative power. By this is meant that, as the government is divided into three departments,—executive, legislative, and judicial,—the Legislature may not usurp or trespass upon the powers that belong to the other departments.

Second. It may disregard some direction of the Constitution required to be observed in the manner of enacting laws; such for example, as that which forbids any bills to be introduced after the first 50 days of the session, or that which provides that no law shall embrace more than one object, which shall be clearly expressed in its title.

Third. The Legislature may attempt to prescribe a rule of action which is forbidden by the Constitution.

That is what it is claimed has been done in the case of the law in question. It is said that the Legislature has attempted to establish a rule for the conduct of elections of Representatives in the legislative districts where more than one is to be elected which the Constitution forbids. To determine whether this is so, we must

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examine the Constitution to see whether it contains any express prohibition of the act passed, or, if not, then whether it is forbidden by necessary implication. It is not claimed that there is anything in the Constitution that expressly prohibits this act of the Legislature. It is said by my Brother CHAMPLIN that—

"The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than in a democratic." From this he deduces that "the Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for in that instrument. The political history of the State from 1836 to the present time shows that every elector has an equal voice in the choice of those who shall represent the people in the Legislature. It is implied in those provisions of the Constitution which require that Representatives in the Legislature shall be chosen by ballot, and by single districts. By these provisions every elector expresses his wish by ballot, and a single vote is implied."

It is because the act in question is supposed by my brethren to be in conflict with these ideas of what is involved in a republican form of government that they hold it invalid.

It was undoubtedly contemplated by the framers of our Constitution that the State should have and maintain a republican form of government, with all that is implied; but it does not follow from this that it was intended that the judiciary should assume to decide what laws

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were best calculated to accomplish that end. The absolute rule of the majority, in which the minority shall have no voice, is not believed by all to be essential to republican government. There are those who contend that a government comes nearest to being a government of the people when it contains representatives of all classes and shades of opinion prevalent in the community represented. It is this idea that is recognized in the division of the State into representative districts. If all the Representatives were elected on one general State ticket, the complexion of the Legislature would tend to be unanimous, one way or the other. By dividing the State into districts, the minority party in the State is able in localities to secure representation. The provision of the Constitution which requires townships or cities entitled to more than one representative to elect them on a general ticket operates, without having been intended so to do, against the wise policy applied by the Constitution to the rest of the State. If the cities of Detroit and Grand Rapids were divided into representative districts, those who belong to the minority party of the city, taken together, might be able to elect one or more Representatives to the Legislature. It will hardly be contended that that would be subversive of a republican form of government. It would, on the other hand, conduce to the advancement of a principle much contended for, that representatives should be brought near to the people. Opinion by MORSE, J., in *Attorney General v. Detroit Common Council*, 58 Mich. 226.

If the position taken by my brethren is correct, that the law is bad because it violates a fundamental principle of republican government, that argument is equally strong against its being adopted into the Constitution by amendment. To so amend the Constitution would, if my brethren are right, be in violation of that provision of

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the federal Constitution which requires the United States to guarantee to every state a republican form of government. Article 4, § 4. This argument against the law is based upon the further idea that it gives unequal rights to electors, and that an elector may be deprived of his right to vote for all representatives to be elected on the general ticket; whereas, under it, all electors have an equality of suffrage, which includes the right to vote for all or as many of the representatives on the ticket as they choose. It is a popular idea that a republican form of government necessarily involves the right of the majority to govern; but neither the Constitution of this State, nor the practice under it, gives any sanction to that idea. The Constitution says nothing upon the subject, but the laws which govern elections provide that the person receiving the highest number of votes shall be elected. Under this rule it rarely happens that the person elected is the choice of a majority of the electors, and in some cases he represents the choice of a comparatively small minority. If the right of the majority to govern is fundamental, it is no answer to this assault upon it to say that the minority which is permitted to elect is larger than some other minority that has voted for some one else. The fact that any minority is permitted to rule is conclusive that the rule of the majority is not essential to popular government. Neither, in my judgment, is it essential to a government by the people that elections should be conducted in one way rather than in another, provided freedom of choice and equality of right be maintained. There is nothing essentially destructive to such a government in a law which permits an elector, who has the right to vote for several representatives, to cast the same number of votes for one of such representatives, if he prefers to do so. The essential thing to him is the right to a voice in the choice of his repre-

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sentatives. If he believes he will be better represented by one of the seven than by the other six, certainly no right of his is abridged by allowing him so to express his choice; nor is the right of any other elector abridged, because he may do the same thing if he pleases, or he may scatter his votes among seven.

I have not intended, in what I have said of the merits of this system of voting, to concede that its merits are open to review by this Court. In my view, the merits of the law were conclusively determined by the Legislature when it was enacted, and so remain until it is repealed. I have intended only to show that people differ in their opinions as to whether this law is opposed to the spirit of our institutions as embodied in the Constitution. This brings me to speak of what seems to me the fundamental error upon which the opinion of the majority of the Court rests. It is conceded that the people, by an amendment to the Constitution, could establish this system of voting. This concession rests upon the principle that all political power is inherent in the people. But the people have delegated their power to the different departments of government. "The legislative power is *vested* in a Senate and House of Representatives." Const. Art. 4, § 1. The legislative power so vested is *all* the power before inherent in the people, subject only to such limitations as are expressly or by necessary implication contained in the Constitution. It is said by my Brother CHAMPLIN that the framers of the Constitution had no thought of investing the Legislature with the right to enact this law. The subject-matter of the law is certainly within the domain of legislative power. The Constitution does not provide in detail the manner of holding elections, leaving that to legislative discretion. It could not with propriety have been left to the executive or judicial discretion. The Constitution of 1835 was

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like the present, in that it did not provide in detail the manner of holding elections. Under it that power had been assumed by the Legislature from the first. If such a thing were needed, I regard the failure of the framers of our present Constitution expressly to limit a power which the Legislature had assumed to exercise as a concession of such power, with all that is involved in the way of legislative discretion. In *People v. Blodgett*, 13 Mich. on page 136, Mr. Justice CAMPBELL says:

"It was not contended on the argument that, if the Constitution is silent on the subject, the Legislature may not allow the citizens of Michigan to vote beyond its limits. Whether the State can provide such safeguards against abuse abroad as it can at home cannot govern legislative action on such a matter. If there is no constitutional prohibition, the Legislature must determine for itself whether the importance of securing the privilege of voting to its citizens abroad is overbalanced by the difficulty of enforcing all the safeguards against abuse which may be enforced at home in all cases."

In determining whether the Legislature has transcended its powers, we must look to see, not whether such power has been specifically granted, but whether it has been withheld, and, if not withheld, it vested under the original grant of all legislative power inherent in the people. *Scott v. Smart's Ex'rs*, 1 Mich. 307; *People v. Gallagher*, 4 Id. 244; *Sears v. Cottrell*, 5 Id. 257; *Attorney General v. Preston*, 56 Id. 179. If the argument against the law be summed up in a word, it is that it violates what my brethren believe to be the spirit of the Constitution. What is the spirit of the Constitution, apart from its text, which is the body it inhabits? Who shall define it so clearly that there need be no two opinions as to what it is? Is it a guaranty of natural rights, supposed to be inalienable? If so, is there no dispute as to what are natural rights? Is it a guaranty of equal voice in the government? If so, is there no difference of opinion as

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to the methods by which such right is best secured? For myself, I am unwilling to search the Constitution for an undefined spirit supposed to pervade it, for the purpose of basing upon such research a right to add anything to, or to take anything from, the Constitution as it reads. If that instrument is not explicit enough; if it covers too many or too few subjects; if it ought to prohibit the passage by the Legislature of a cumulative voting law,—it may be amended. I shall not consent to amend it by construction. It is true that constitutions, like statutes, are to be construed in the light of previous history and the circumstances surrounding their adoption; but this rule of construction, while useful in the interpretation of doubtful clauses or technical words and phrases, will never, in my judgment, justify the interpolation of an idea or principle. When this is permitted, the Constitution in a sense ceases to be a written charter, and exists to a great extent in the judgment and conscience of a changing judiciary. Great danger is to be apprehended if the courts are to say what the spirit of the Constitution is, or what its framers intended more than they said. The instrument is in writing. The people, who made it, can amend it. Where, then, arises the necessity for looking much beyond its plain letter, to discover some occult meaning, discernible only to those who, by reason of their special learning, are able, or believe themselves to be able, to discover the unexpressed intention of the framers of the instrument?

The law of growth applies to governments in all their departments. There is a constant tendency in each to expand its power at the hazard of encroaching upon the rights of other departments. The judicial power is in especial danger from this tendency to arrogate power. The other departments of the government are held in restraint by the judiciary, and by a more intimate

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responsibility to the people arising from shorter terms of office. But who shall restrain the courts in the exercise of their judicial functions? The practical difficulties in the way of correcting any misuse of power must ever be a solemn admonition to the judicial conscience to beware of usurpation.

Another cardinal rule that is to be observed in passing upon the constitutionality of statutes is that stated by Mr. Justice CHRISTIANCY in *Sears v. Cottrell*, 5 Mich. 259:

"No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature *are to be presumed* constitutional until the contrary is shown. * * * In cases of doubt, every possible presumption not clearly inconsistent with the language and the subject-matter is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never when serious doubt exists as to the conflict." See, also, Cooley, Const. Lim. 182–186.

We were cited on the argument, and allusion is made in my Brother CHAMPLIN'S opinion, to certain extraordinary acts of supposed legislation which it is said are not expressly forbidden by the Constitution, and which it is assumed no one would hesitate to pronounce unconstitutional. As I can conceive of no decision of a court of last resort so tyrannical or unreasonable as not to be conclusive until overruled, so I can conceive of no legislation so unreasonable or unjust as not to be law until repealed, provided it be not forbidden by the Constitution. A conclusive presumption arises to support the action of every department of the government when acting within its jurisdiction. In support of the views here expressed, I cite the following additional authorities: Cooley, Const. Lim. 167–174, and cases cited; 1 Kent. Comm. 448; *Calder v. Bull*, 3 Dall. 398, opinion of Mr. Justice Iredell;

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Cochran v. Van Surlay, 20 Wend. 383; *People v. Mahaney,* 13 Mich. 481; *Whallon v. Judge,* 51 Id. 503; opinion of Chief Justice COOLEY, concurred in by Mr. Justice CHAMPLIN, in *State Tax Law Cases,* 54 Mich. on pages 395, 446, 447; *Auditor General v. Sloman, ante,* 118.

Treating the question involved as purely one of legislative power, and discovering nothing in the act which was not within the legislative discretion, I hold the law to be constitutional.

THE ELECTRIC RAILWAY COMPANY OF GRAND RAPIDS v. THE COMMON COUNCIL OF THE CITY OF GRAND RAPIDS.

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Municipal corporations—Grant of franchise—Vested rights—Void condition.

The condition attached by respondent to the use by the relator of wooden poles outside of the fire limits of the city, that it should furnish passengers with transfers on certain designated lines of its road without additional charge, is held inoperative and void, being in conflict with section 14, chap. 95, How. Stat.; but as the relief prayed for by relator has been voluntarily granted by respondent, a *mandamus* is denied.

Mandamus. Submitted November 18, 1890. Denied December 24, 1890.

Relator applied for *mandamus* to compel respondent to proceed and approve of the kind and pattern of poles to be used by relator for the purpose of operating its road. The facts are stated in the opinion.

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Montgomery & Bundy, for relator.

Wm. Wisner Taylor (*Smiley & Earle*, of counsel), for respondent.

LONG, J. The relator is a corporation organized under chapter 95, How. Stat., which provides for the organization of street railway companies.

Section 13 of the act provides that such railway company organized under the provisions of the act may, with the consent of the corporate authorities of the city given in and by an ordinance duly enacted for that purpose, and under such rules, regulations, and conditions as in and by such ordinance shall be prescribed,—

"Construct, use, maintain, and own a street railway for the transportation of passengers, * * * but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets."

Section 14 of that chapter is as follows:

"After any city, village, or township shall have consented, as in this act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city, or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

The relator sets forth in the petition that, on October 24, 1889, an ordinance was granted by the common council of the city of Grand Rapids to Samuel Mather and others, and their associates, to be afterwards organized into a body corporate, authorizing them to maintain and use street railways in certain streets in the city of Grand Rapids; that the corporation was organized and the ordinance accepted by the corporation, and that the company was organized to operate a street railway system

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already constructed, in the main, constituting various lines of street railway in said city, having definite *termini*, and that cars had been run over said routes for a long time, under definite authority by ordinance granting permission to the Street Railway Company of Grand Rapids, to whose rights the relator had succeeded; that on December 16, 1889, another ordinance was granted to the same parties, authorizing them to maintain street railways in other streets of the city, which ordinance has been accepted by the relator, and the rights granted in this ordinance have also been assigned to relator. It is further claimed by relator that in each of said ordinances, by sections 5, 7, and 15, it is provided as follows:

"SEC. 5. The cars to be used on said railway shall be drawn by electricity, or such motive power as may seem best to said company, and permission and authority are hereby given to said grantees and their assigns to place and erect in the streets of said city, on either side thereof, wherever their street railway tracks are constructed, suitable poles for suspending electric wires through and over said streets, the kind and pattern thereof to be approved by the common council of said city before the same are erected; to place in and over said streets wires and cables for the purpose of conducting electricity thereon, suitable and necessary insolating appliances, and suspension wires or cables."

"SEC. 7. The rate of fare on said railway shall be determined by said company, and shall not exceed five cents for each passenger on any car from its starting-point to the terminus of its route, and satchels in the possession of passengers shall be carried free of charge: *Provided*, that for extra cars, specially chartered, the said grantees may fix the rate of fare."

"SEC. 15. It is hereby reserved to the common council of said city the right to make such further rules, orders, and regulations as may, from time to time, be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railway, and the streets through which it passes."

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It is further set forth in the relator's petition that in July last it petitioned the common council to approve of the kind and pattern of poles to be used in its system, and submitted plans to the council; that the subject was referred to the committee on streets, which committee reported that they, after carefully examining the proposed poles, recommended for adoption and approval of the common council the following:

"1. Iron poles, to be the E. P. Morris poles, or an iron pole of the same dimensions, and substantially like said E. P. Morris poles, and all of equally good workmanship, finish, and style.

"2. For the wooden poles the octagonal red pine pole, as manufactured by Browlee & Co., or a wooden pole substantially like said Browlee & Co.'s pole as to material, dimensions, style, and finish," etc.

That on July 20, 1890, the committee made a further report, in which it was recommended that the fire limits of said city, as now constituted, be designated as the district wherein iron poles only should be used, and that iron or wooden poles could be used in all parts of the city outside of the fire limits, at the option of the railway company; and that on July 28 said report was amended by adding the following thereto:

"And, in consideration of granting said street railway company the privilege of erecting said wooden poles in certain public streets of the city, said company shall be required to furnish its patrons, through its conductors, drivers, or agents on or in charge of their several street-railway cars, without additional cost, transfer tickets on the following named lines, namely: Cherry street and Eighth ward line; West Bridge street and Ionia line; Wealthy avenue and Scribner street line; passengers to be, on demand, furnished with transfer tickets good on the so-called Hall street and Plainfield avenue line, and said Hall street and Plainfield avenue line passengers to be, on demand, furnished with transfer tickets good on the above enumerated lines, namely: Cherry street and Eighth ward line; West Bridge street and Ionia line;

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Wealthy avenue and Scribner street line. And thereupon said report of said committee was by said common council adopted."

The petition sets forth further, in substance, that on August 18, 1890, and on September 28, 1890, the railway company asked the council to approve of the kind and pattern of pole to be used in the construction of the railway line, and that the common council have taken no action thereon.

The respondent makes a return in which it admits the making of such ordinances, the organization of the relator as a corporation, the acceptance of the ordinances by the corporation, and that the ordinances are correctly set forth in the relator's petition. It is claimed, however, that no definite and various lines of street railway having definite *termini* were established, but the right was given to the street-railway company to operate a street railway over the streets theretofore occupied by several street-railway companies, as one route, and nowhere in said ordinances were various routes having different *termini* fixed or specified, but that the entire system constituted one route.

It is claimed, on the part of the relator, that the condition annexed by the common council to the permission to erect wooden poles in all parts of the city outside the fire limits, as adopted by the council on July 28, 1890, is invalid, and beyond the power of the council to prescribe; that the action of the council shows that it is not necessary to erect iron poles outside such fire limits, but the condition upon which the relator is permitted to erect the wooden poles in such territory is an effort on the part of the city to drive a bargain with the relator, and compel it to accept this condition in consideration of the common council doing precisely what it had

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already agreed to do by its ordinance, and what it was bound to do; that is, to fix the kind and pattern of poles to be used. The prayer of the relator is that the common council be required to proceed to approve of the kind and pattern of poles to be used by the relator for the purpose of operating its road under the right granted it by the ordinances.

We are satisfied from an examination of the ordinances:

1. That by section 5 it was the duty of the common council to fix and determine the kind and pattern of poles to be erected and used by the relator.

2. That the common council have so fixed and determined the kind and pattern of such poles by its resolution of July 28, 1890; that is, iron poles within the fire limits of said city, and wooden or iron poles outside of said fire limits.

3. That the condition attached to the use of wooden poles outside of such fire limits is wholly inoperative and void, and beyond the power of the council to prescribe. This condition is in direct conflict with section 14, chap. 95, How. Stat., and is an attempt to deprive the relator of the rights and privileges conferred by the ordinances theretofore adopted, and the terms of which it is conceded the relator had duly accepted.

As the council has already done what the relator prays it may be compelled to do, the writ of *mandamus* must be denied.

CHAMPLIN, C. J., and GRANT, J., concurred with LONG, J.

CAHILL, J. I think the common council has the right, under the powers reserved in the ordinance, to impose the conditions which it has sought to impose upon the relator as a condition precedent to its approval of the

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kind of poles to be erected. Neither do I think that the resolution as passed, with the condition annexed, can be treated as though passed without it, on the theory that such condition is void.[1]

MORSE, J., concurred with CAHILL, J.

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MARGARET SCHEHR v. WILLIAM LOOK, ADMINISTRATOR, ETC.

Will—Life-estate—Trust.

A testator gave the executors named in his will full power and authority to sell and convey all of his estate, and directed them to invest the proceeds in certain specified securities. He then bequeathed to his wife, during her natural life, the use, income, and profit of all of his estate, and the interest arising from such investments, out of which she was to support his minor children until 16 years of age, or until able to support themselves; and after her death the remainder and residue of his estate was devised to his children equally, to have and to hold forever. The executors resigned without executing the trust, and an administrator *de bonis non* was appointed, and the estate was closed as far as payment of debts and expenses of administration were concerned, leaving about $4,000 in personal property in the administrator's hands; and on his refusal to turn it over to the widow she filed a bill to construe the will, and it is held:

a—That the interest of the complainant is limited to the use of the estate during her life, and after her death it vests in the children.

b—Whether or not the testator intended to vest any estate in the executors, or only to give them power of disposition, does not become material. The execution of the trust failed by their resignation before any portion of the estate was disposed of, or any distribution made of the estate, which is in the hands of the administrator, and upon proper application a

[1] See *Detroit v. Railway Co.*, 37 Mich. 558.

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court of chancery would have power to appoint the necessary trustee for its control and management, and provide for the payment of the income over to the widow.

Appeal from Wayne. (Reilly, J.) Submitted on briefs December 5, 1890. Decided December 24, 1890.

Bill for construction of a will, and for an accounting. Decree dismissing bill affirmed. The facts are stated in the opinion.

William E. Walsh, for complainant.

William Look, in *pro. per.*, and *Harry F. Chipman*, for defendant.

LONG, J. John Schehr departed this life in Wayne county on September 12, 1869, leaving surviving him his widow, Margaret Schehr, and six children, his heirs at law. By his last will and testament he nominated and appointed Frank Nohe, Adam Betzing, and William Darmstaetter, of the city of Detroit, to be the executors of his last will, giving them full power and authority to sell, convey, and dispose of any and all personal and real estate of which he died seised and possessed, at such times, to such purchasers, and upon such terms as to the said executors should seem meet, whenever they should find the sale advantageous to the estate: the executors to invest the proceeds of such sales in good and approved bonds and mortgages upon real estate in Wayne county, and upon no other kind of security. The second, third, and fourth clauses of the will read as follows:

"*Second.* I give, bequeath, and devise unto my wife, Margaret Schehr, of the city of Detroit, county of Wayne, and State of Michigan, during the term of her natural life, the use, income, and profit of all my property, real, personal, and mixed, of every nature whatever, and the interest arising from the aforesaid investments, under the following conditions: She shall out of the income prop-

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erly support and educate my children until they become sixteen years of age, or until they are able to support themselves.

"*Third.* The foregoing provision is to be received and accepted by my wife, the said Margaret Schehr, in lieu of any and every claim of dower.

"*Fourth.* From and after the decease of my wife, the said Margaret Schehr, I give, bequeath, grant, and devise all the remainder and residue of all my estate, real, personal, and mixed, of every nature whatever, unto my six children, namely, Caroline Gries, Catharine Schehr, John Schehr, Marie Schehr, Barbara Schehr, and Edward Schehr, to be equally divided among them, and to have and to hold the same unto them, my said children, their heirs and assigns, forever."

Two of the executors named entered upon the discharge of their duties, but subsequently resigned, when Daniel Fleper was appointed administrator *de bonis non*, with with the will annexed. Upon his resignation the present administrator was appointed.

It appears that the estate consists of about $4,000 of personal property. The estate has been closed as far as the payment of debts and administration expenses are concerned, but the administrator has possession of the estate, and refuses to turn it over to the complainant in this cause, who claims that she is entitled to the possession of the property and estate of the deceased, upon the grounds—

1. That she takes the estate absolutely, according to the terms of the will.
2. That, though she does not take absolutely under the terms of the will, yet she is entitled to the possession of the funds in the hands of the administrator, and to have the care and control of such funds during the term of her natural life.

The bill is filed to obtain a construction of the will, and for an accounting with the administrator, and con-

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tains a prayer that the moneys, mortgages, bonds, stocks, and other securities may be turned over to her. In the court below the bill was dismissed. The questions at issue are to be determined upon a construction to be given to the clauses of the will above set out.

Counsel for complainant cites *Sutphen v. Ellis*, 35 Mich. 446; *Jones v. Jones*, 25 Id. 401; *Proctor v. Robinson*, 35 Id. 291,—in support of his contention that the widow took the property absolutely under the terms of the will. These cases are, however, plainly distinguishable from the present case. In *Sutphen v. Ellis, supra*, the language of the bequest to the wife was:

"I give and bequeath unto my beloved wife, Ann, all of my estate, both real and personal, during her natural life, for her use; but after the death of my said wife, I hereby bequeath unto the children of my brothers and sisters each an equal share of what may be left of my said estate after the death of my wife."

It was held that the terms employed in the limitation to the nephews and nieces tended strongly to show an intent on the testator's part that they should take only what should be left of his estate at the death of his wife, and not the whole body of the estate, of which the wife was to have the use merely. And so in the other cases cited, it appears very plainly that the testators did not intend to limit the estate of the wife to the use merely, and this was gathered from the terms of the will.

In the present case, however, it is evident from the language employed that the estate bequeathed to the wife is intended to be limited to the use, and after her death the whole body of the estate is to become vested in the children. Whether or not the testator intended to vest any estate in the executors, or only to give them power of disposition, does not become important. The execution

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of the trust failed by the resignation of the executors before any portion of the estate had been disposed of or any distribution made. The estate is now in the hands of the administrator, and upon proper application undoubtedly a court of chancery would have power to appoint the necessary trustee for the control and management of the estate, and to pay the income over to the widow. But the fair interpretation of the will is that the testator intended to give the widow only the use, and that the whole body of the estate, after her decease, should go to the children. It is also quite apparent that the testator did not intend that the widow should have full possession and control of the estate, with the power absolutely to sell and dispose of it, or to use the estate, aside from the income to be derived from its use; and that the estate might be preserved to the children after the death of his wife, he named these parties as executors of his will, and gave them the power to control and invest it. From the intimation given here there will be no difficulty in settling the questions as to the care and management of the estate, to the end that it may be preserved to the children. The court below very properly dismissed complainant's bill.

The decree will be affirmed. The costs will be allowed out of the estate.

The other Justices concurred.

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JAMES TOWLE AND GEORGE G. DOUGLAS v. WILLIAM DUNHAM ET AL., SURVIVORS, ETC.

[See 76 Mich. 251.]

Partnership—Note given for individual debt of one partner—Evidence.

1. The statements of one partner that notes given by him in the firm name were used in his private business, made after the notes were given and not in the presence of the payees, are not competent evidence of such fact in a suit upon the notes.
2. A statement made by a party at and during the time of a transaction is admissible as showing what the transaction was.
3. Requests to charge which, in effect, treat the case as one to be disposed of by the court, are properly refused where there is some evidence to go to the jury in support of the theory of the opposite party, and which, if sustained, entitles him to a recovery.
4. Where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, to the knowledge of the person taking it, the other partners are not bound unless they have consented thereto; which assent need not be express, but may be shown by circumstances, like any other fact.
5. While separate items of testimony, standing alone, may not warrant the court in submitting the claim of a party in support of which they are offered to the jury, the court may be warranted in submitting all of the facts and circumstances which the evidence tends to establish, and in leaving it to the jury to determine, as a question of fact, whether all of the facts proven, and the inferences properly deducible therefrom, will, together with attendant circumstances, make out such claim.

Error to Montcalm. (Smith, J.) Argued December 3 and 4, 1890. Decided December 24, 1890.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

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Godwin, Adsit & McKnight and *George S. Steere*, for appellants.

Fitz Gerald & Barry and *William E. Hoyt* (*Francis A. Stace* and *Charles Chandler*, of counsel), for plaintiffs.

LONG, J. This case was once before this Court, and is reported in 76 Mich. 251. In the former proceeding the plaintiffs had verdict and judgment by direction of the trial court. The cause has again been tried before a jury, and verdict and judgment found for plaintiffs for the amount of the notes in controversy. The defendants bring error. Some of the facts are stated in the former opinion, but, as the court on the former trial excluded a large portion of the defense offered to the notes, some new facts are made to appear in the present trial.

It appears that the business at Chase in July, 1883, was owned by Henry Seaman and Hiram P. Webster as partners, each owning an undivided half interest. The firm of Arthur Meigs & Co. was then composed of Arthur Meigs, William Dunham, and Richard G. Peters. This last-named firm purchased from Mr. Webster his undivided half interest in the firm business with Mr. Seaman for $35,000, and thereupon the firm of Seaman, Dunham & Co. was formed. The members of this firm are the defendants in this suit; Mr. Seaman having deceased since the commencement of suit. When the firm of Seaman, Dunham & Co. was formed, Mr. Seaman owned one-half interest, and the firm of Arthur Meigs & Co., composed of Meigs, Dunham, and Peters, owned the other half interest. The firm of Seaman, Dunham & Co. continued its business for a year and one month, when it was dissolved; Arthur Meigs & Co. purchasing Seaman's interest for the sum of $10,000. The notes in suit were issued in the firm name, and put in circulation by Seaman, and it is not disputed that they were used in his private busi-

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ness, and not for the benefit of the firm of which he was a member.

The contention of the plaintiffs on the trial in the court below was—

1. That the notes were issued and used by Seaman in his private business, with the knowledge and consent of his partners, Dunham, Meigs, and Peters, that they might be so issued and used by Seaman.

2. That, after they had been so used by Seaman, the other defendants purchased Seaman's interest in the business, agreeing to pay therefor the sum of $10,000, and that this $10,000, or so much thereof as was necessary for that purpose, should be applied by Dunham, Meigs, and Peters in liquidating these notes.

The defendants contended on the trial that they never knew that Seaman was using the firm notes in his private business, and never assented thereto, and that the plaintiffs in taking the notes were aware that Seaman had no right or authority to use the firm notes in his private business, and that they knew the notes to be the firm notes; that the $10,000 was to be made up by applying his overdrafts on the books, any non-authorized paper he had given, and the balance by the notes of Dunham, Peters & Co., the new firm, composed of Dunham, Peters, and Meigs.

It appears that at the time Seaman sold out to the other defendants his account was overdrawn in the sum of $3,165.19. The agreement for the purchase of Seaman's interest in the firm business by the other members of the firm is as follows:

"This agreement, made this sixth day of August, A. D. 1884, between Dunham, Peters & Co., of the first part, and Henry Seaman, of the second part, witnesseth, that said Dunham, Peters & Co. have this day bought out all of the interest of said Henry Seaman in the property and business of the late firm of Seaman, Dunham & Co. and Seaman & Dunham for the sum of $10,000, and which is to be paid to said Seaman as follows:

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"*First.* The accounts of the late firms of Seaman, Dunham & Co. and Seaman & Dunham are to be balanced, and any sum that Seaman has overdrawn, if any, is to be applied as part payment of said ten thousand dollars.

"*Second.* Said Seaman has used the notes of the late firms of Seaman, Dunham & Co. and Seaman & Dunham in his private business, and the amount of such obligations of said firms so used by Seaman is to be next applied upon said purchase price of ten thousand dollars.

"*Third.* As soon as the balance to make up said ten thousand dollars shall be ascertained definitely, said Dunham, Peters & Co. are to give said Seaman their note therefor, due August 6, 1885, with interest at 7 per cent. from this date."

It is contended by plaintiffs' counsel that by this agreement the defendants recognized their liability on these notes, and by the agreement provided a fund for their payment; and it is not shown that any settlement was ever had with Seaman, nor any appropriation made of that fund.

It appears that Seaman carried on a business on his own account at Greenville, and had a contract with plaintiffs by which they sold materials for him; and when, in the course of such deal, Seaman owed plaintiffs, he gave them in payment for such indebtedness the notes of Seaman, Dunham & Co. The arrangement was that the plaintiffs were to sell shingles, the cut of a certain mill of Seaman's, on commission; that plaintiffs should from time to time make advances to Seaman, giving the notes of Towle, Douglas & Co. in proportion to the amount of shingles delivered to plaintiffs to sell, which it was agreed should not exceed at any time the amount of shingles on hand. It was further agreed that, if at any time when such notes became due sufficient returns had not been received from the sales of shingles to take care of such notes, Seaman should make provisions to meet them, either by giving his own notes, or in any other way he saw fit to provide for them, and in that way the notes

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in suit came to be given. During the transaction, two checks and eight notes were given, signed by Seaman with the firm name of Seaman, Dunham & Co. The checks and four of the notes were paid. It was contended on the part of the plaintiffs that, at the time of giving the first note signed in the firm name, plaintiff Douglas, who transacted all of plaintiffs' business, inquired of Seaman why he gave the firm note, and was answered that it was all right, and in accordance with the arrangement Seaman had with his partners. Plaintiffs discounted the note in the usual way, and afterwards received the firm notes without further question. William Dunham, one of the defendants, testified that he had no knowledge of the making of these notes until about the time of the dissolution with Seaman. Meigs does not testify that he had no knowledge of their being given, or that he did not assent to such an arrangement. Peters was not called as a witness on the trial.

The first assignment of error relates to the exclusion of testimony offered by defendants. It was proposed by the defendants to prove the statements of Mr. Seaman, not made in the presence of either of the plaintiffs, that the notes in question were given in his private business. This the court ruled out, and upon this ruling defendants base their first assignment of error. These were statements made after the notes were given, and not in the presence of the plaintiffs, and were properly excluded. They were statements of one joint defendant to another joint defendant, and under no rule could such statements be held to affect the rights of the plaintiffs. The claim is made that this testimony was competent for the reason that Seaman had become identified with the plaintiffs in the wrongful use of the firm paper, and that therefore Seaman's statements in relation to it were admissions that would bind the plaintiffs. There is no rule, even if

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the claim were admitted that the plaintiffs were guilty of wrong-doing in taking this paper, that would make this statement of Seaman competent evidence. If made, it was after the transaction had closed, and upon that ground alone was properly excluded. *People v. Arnold*, 46 Mich. 269.

The third assignment of error relates to the refusal of the court to strike out the testimony of the witness Leroy Moore concerning statements made by Seaman to him as to why his bank account with him was kept in his individual name, and that it was actually the account of the firm of Seaman, Dunham & Co. This was a statement made by a party at and during the time of the transaction, and therefore admissible, as showing what the transaction was. 1 Bates, Partn. § 450, and cases there cited.

The assignments of error from 4 to 14, inclusive, relate to the refusal of the court to charge the jury as requested by the defendants. These requests are as follows:

"2. In this case, by the testimony of one of the plaintiffs, Mr. Douglas, it appears that the notes in question in this case were made by Henry Seaman and passed to Towle and Douglas, the plaintiffs, in a deal that existed between Towle and Douglas and Henry Seaman, in which Seaman, Dunham & Co. were in no way interested; and I charge you, as a matter of law, that these notes constitute no legal obligation against Dunham, Meigs, or Peters, who are the other partners besides Henry Seaman, composing the firm of Seaman, Dunham & Co.

"3. Some evidence has been offered in this case on the part of plaintiffs which they claim tends to show that the defendants, Dunham, Meigs, and Peters, authorized Henry Seaman to make use of the paper of Seaman, Dunham & Co. in his private business, and a part of this is the written contract given by Dunham, Meigs, and Peters to Seaman, promising to allow him $10,000.00 for his interest in the property of the firm. I charge you, as a matter of law, that this contract, and the evidence

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offered with it, is not sufficient to charge the defendants with the paper in question; that Towle, Douglas & Co. were not parties to the contract between Henry Seaman and Dunham, Meigs, and Peters at the time of their dissolution, and are not entitled in this suit to the benefit thereof.

"4. Evidence has been put in in this case upon both sides bearing upon the question as to whether or not Seaman had drawn from Dunham, Meigs, and Peters, in the way of using their paper unlawfully, the full sum of $10,000 agreed to be paid to him for his interest in the firm property. The books of the company that were kept under the direction of Henry Seaman are introduced, and, as posted, it appears that Henry Seaman was overdrawn $3,165.19. The defendants also offer in evidence a number of checks and notes that were not upon the books, and which they say that Seaman used in his private business, making up a sum total that would raise the whole sum up to and above $10,000. Now, I charge you, as a matter of law, that if you shall find from the testimony in this case that Seaman received by way of checks and notes that he used unlawfully, added to the balance of the amount overdrawn, the full sum of $10,000, in that event plaintiffs cannot recover, and your verdict will be for the defendants.

"5. Examinations have been made before you, and inquiries into various items found upon the books of Seaman, Dunham & Co. on the part of plaintiffs; but an examination of the entire accounts, and the balance deduced therefrom, has not been prepared upon either side. I therefore instruct you that this evidence cannot be considered; that it is not competent in this manner to attempt to find the balance, as between themselves, of the amount owing to the several members of the firm of Seaman, Dunham & Co.; and that this evidence that has been admitted cannot be considered, as it is not competent for you to decide as to whether Seaman has been paid his full $10,000 or not, by calling attention to odd entries, and not taking into consideration the entire amount in the same manner.

"6. For the purposes of this case, it is the law that plaintiffs cannot recover upon the assumption that the notes in suit in the case might be recovered from defendants as if a part of the $10,000 agreed to be paid to Sea-

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man for his interest in the property of the firm of Seaman, Dunham & Co., for the reason that no settlement or other lawful determination has been made between the members of the firm of Seaman, Dunham & Co. as to the amount that Henry Seaman would be entitled to upon an accounting between the parties; and that it is not competent for you to attempt in this case, in this manner, an accounting between the members of the firm.

"7. It being admitted in this case that these notes were given by Henry Seaman to plaintiffs to be used in the private business of Henry Seaman, this throws the burden upon the plaintiffs to prove that the notes were authorized or otherwise valid. This plaintiffs attempted to do by showing the agreement of Dunham, Meigs, and Peters to pay Seaman $10,000 for his interest, which was to include his overdrafts. The burden still remained upon plaintiffs to show negatively that the full sum of $10,000 has not been paid. This plaintiffs have failed to do, and for that reason plaintiffs cannot recover."

"9. Plaintiffs claim in this case that, although these notes may have been given by Mr. Seaman without the knowledge or authority from any member of defendants' firm at that time so to do, notwithstanding such want of authority defendants have ratified the acts of said Seaman by recognizing them, and by paying other notes given in a similar manner and of the same character. There can be no ratification upon the part of these defendants unless they had full knowledge of the acts to be ratified; and I charge you that there is no evidence in this case that defendants had any such knowledge, and that there is no evidence of ratification upon the part of said defendants of these notes in question."

"11. There can be no recovery upon the notes under and by virtue of the agreement made on the day of the dissolution, which has been introduced in evidence, until after there has been an accounting between Henry Seaman, or his estate, and the surviving members of the firm; and no such accounting is claimed or proven in this case, and your verdict must be for the defendants.

"12. I instruct you, as a matter of law, that upon the facts of this case, as shown by the plaintiffs, plaintiffs cannot recover, and it is your duty to render a verdict for the defendants of no cause of action.

"13. I instruct you, as a matter of law, that Towle and Douglas, not being parties to the agreement of

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Meigs, Dunham, and Peters to allow him the $10,000, including what he had overdrawn, for his interest in the firm of Seaman, Dunham & Co., have no right to claim the benefit thereof, and cannot have any claim thereon in relation to the notes in suit from anything offered in this case.

"14. I also charge you that if, in making the contract between Seaman and the other members of the firm to allow him $10,000 for his interest in the firm, the defendants were deceived, and did not know that Seaman had used the checks and notes of the firm to a large amount not on the books, this would render the contract void as to defendants."

These requests, in effect, treat the case as one to be disposed of by the court. There were other issues, and claim was made, upon other grounds, that the plaintiffs were entitled to recover, aside from the question of this settlement between the members of the firm of Seaman, Dunham & Co. These requests were properly refused, as it is apparent that there was some evidence to go to the jury upon the theory that Seaman was authorized to issue the firm notes in his private business. The issue between the parties did not rest upon the sole question of subsequent ratification of Seaman's acts in using the firm paper, but claim was made that he was authorized to do so by the other partners; that they were cognizant of the fact at the time of issue, and made no objection to his carrying on the business in that way. But, aside from these questions, the court fairly left the question of the subsequent ratification by the other defendants to the jury. The court instructed the jury upon that branch of the case as follows:

"An agreement in writing has been put in evidence, made at the time of the dissolution, in which Dunham, Meigs, and Peters have agreed to pay $10,000 for the interest of Seaman in the business.. That contract contains a provision in substance agreeing that the $10,000 shall be applied in payment of paper that Seaman had

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used, signed 'Seaman, Dunham & Co.,' in his private business. Evidence is offered to show that, at the time this agreement was made, Seaman deceived the other partners in the amount of such paper he had made use of, and in the amount of moneys he had drawn from the firm, in that a large amount that he had drawn was not upon the books of the firm, and not known by the parties, as defendants claim, when this contract was made. Now, if you find it to be a fact that there had been, before this suit was commenced, paid by the overdraft of Seaman, the Leroy Moore & Co. notes claimed to have been paid by the defendants, and the other notes and checks used by Seaman in his private business, to make up this $10,000, then the agreement would be void. Defendants could not be held to the terms of the contract to their injury, if they were misled by Seaman, and made it without a knowledge of the fact that he had made use of the company's notes and checks."

Referring to the agreement itself, it provides for the payment of these notes first, and an accounting to Seaman for the balance afterwards. It is true that it was supposed the $10,000 would cover all overdrafts and firm papers used by Seaman for his individual benefit, and the plaintiffs' contention under the evidence was that the $10,000 would more than meet it, the defendants claiming that the $10,000 would not cover such overdrafts and notes; but, under the evidence in the case, this was a question of fact for the jury, and fairly submitted to them by the court under its general charge.

It is contended by plaintiffs' counsel that, though the notes were given to pay Seaman's private debts to the knowledge of plaintiffs, there were ample proofs to go to the jury tending to show that Seaman was fully authorized by the other members of the firm to make and deliver the notes in question. The evidence tends to show that, at the time of making the first note in the firm name, Douglas, one of the plaintiffs, at once made inquiry, and was answered by Seaman that he had author-

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ity to sign the firm name to such note. Other paper bearing the signature of the firm had been made by Seaman, and issued to the plaintiffs, in the course of the same transactions and dealings in which the notes in suit were made, and such former paper had been paid at maturity. The dissolution agreement ratifies the authority of Seaman to make such notes, and provides for their payment. Defendant Meigs promised James Towle, one of the plaintiffs, that the notes should be paid, and other notes signed by Seaman in the firm name were paid by the firm of Arthur Meigs & Co. after the dissolution of the firm of Seaman, Dunham & Co., and after this agreement was signed. Some of the members of the firm knew of the use made by Seaman of these notes as early as August, 1884, and did not repudiate them, but assured the plaintiffs that they were all right, and would be paid. Meigs does not state the time when he first became cognizant of the fact of the use made by Seaman of these notes. Dunham and Peters knew of it at the time of dissolution, though it is claimed that they were not aware of the extent of the liability. It is not claimed that the dissolution contract was one upon which the plaintiffs might found a cause of action, but a circumstance tending to show a ratification, and to be considered by the jury among other facts and circumstances in the case. All these facts and circumstances were proper to be considered by the jury in determining whether there was a subsequent ratification by the other defendants. This was the theory of the court below as contained in its general charge, and there was no error in submitting these questions to the jury for their determination.

The court instructed the jury:

"It is a fact that the notes were given for the benefit of Seaman, and not for firm purposes, and this was known to Towle and Douglas. They (the plaintiffs) did

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not stand then in this case in the position of innocent purchasers of firm paper, for in this case they must be held to have known that the consideration for the notes was the debt or promise of Seaman to the plaintiffs, and hence they knew that the firm received no consideration or benefit for the notes given. So, stopping right there, the plaintiffs could not recover. But the plaintiffs say—*First*, that the defendants consented to the giving of these notes by Seaman for his benefit; and, *second*, that the defendants have ratified the acts of Seaman, even if the notes were given without authority. There are two questions for you to settle:

"1. Did the defendants authorize or consent to the giving of these notes by Seaman for his individual benefit?

"2. If they did not authorize it, have they since ratified it?"

The court then called the attention of the jury to the various circumstances surrounding the case, and directed the jury that the burden was upon the plaintiffs to establish these facts. The charge was very full and fair.

It is well settled that where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, and known to be so by the person taking it, the other partners are not bound unless they have consented. The assent, however, need not be express. It may be shown by circumstances, like any other fact. 1 Colly. Partn. § 439, note 4; *Gansevoort v. Williams*, 14 Wend. 133; *Gruner v. Stucken*, 39 La. Ann. 1076 (3 South. Rep. 338). In the present case there was some evidence from which the jury might properly infer, not only that Seaman had authority to issue the paper, but the circumstances strongly show that, in the agreement for dissolution made between Seaman and the other members of the firm, they had knowledge of the fact that these notes were outstanding, and that they were to pay and discharge them up to the amount of the $10,000; and

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the circumstances warranted the jury in saying that Seaman's account was not overdrawn that amount. This would amount to a ratification of Seaman's acts in issuing the notes, even though their issue was not authorized by his partners.

Some question is raised that the court was in error in admitting the partnership articles of Seaman, Dunham & Co, We see no error in this.

Counsel for the defendants take up in their brief each separate item of evidence offered by plaintiffs to show the authority of Seaman to issue the notes, and as tending to show the subsequent ratification of the act; and counsel argue that such testimony would not support the claims made for it. One of these items, standing alone, may not have warranted the court in submitting to the jury the question of authority, or of subsequent ratification; but the court was warranted in submitting to the jury all the facts and circumstances which the evidence tended to prove, and leaving it to be determined by them, as a question of fact, whether all the facts proven, and the inference properly deducible therefrom, together with attendant circumstances, made out the plaintiffs' claim.

Some other questions are raised which we do not deem it important to notice.

The judgment must be affirmed, with costs.

The other Justices concurred.

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GEORGE THOMPSON v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Negligence — Master and servant — Fellow-servants — Incompetent employé.

1. Previous negligence on the part of a railroad engineer, if established, is not important unless he is also shown to have been negligent at the time of the injury for which suit is brought.
2. In the absence of any evidence tending to show that a railroad engineer was negligent in allowing the fireman to operate the engine at the time the plaintiff was injured while attempting to couple cars, and which alleged negligence is the gist of plaintiff's action, a verdict should be directed for the defendant.

Error to Kent. (Burch, J.) Argued December 4, 1890. Decided December 24, 1890.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

FitzGerald & Barry (*Charles Chandler* and *Francis A. Stace*, of counsel), for appellant, contended:

1. Under his declaration, plaintiff was bound to prove—
   a—That the fireman was raw and unskilled, and incompetent to operate the engine;
   b—That the engineer was in the habit of allowing incompetent persons run his engine;
   c—That the defendant had notice of this habit of the engineer, or that it was so notorious that it was its duty to have known it;
   d—That the incompetency of the fireman was the proximate cause of the injury; citing *Catlin v. Railroad Co.*, 66 Mich. 358.
2. It was not negligent to allow the fireman to operate the engine in the manner shown by the evidence; citing *Greenwald v. Railroad Co.*, 49 Mich. 197.
3. Not a particle of evidence was offered tending to show any

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notice to the defendant, actual or constructive, that Moore had been negligent or untrustworthy in any manner, and, if he had become so habitually negligent and untrustworthy as charged, the defendant would not be liable unless it had notice, or ought to have taken notice, of it; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Dolan*, 32 Id. 510; *Railroad Co. v. Gilbert*. 46 Id. 176; *Hilts v. Railway Co.*, 55 Id. 437.

4. Personal negligence of the defendant is the gist of this action. When a servant demands from his master compensation for an injury received in his service, he must trace some distinct fault to the master himself, which must be the one charged in the declaration; citing *Mining Co. v. Kitts*, 42 Mich. 34; *Batterson v. Railway Co.*, 49 Id. 184; *Mitchell v. Railway Co.*, 51 Id. 236; *Catlin v. Railroad Co.*, 66 Id. 358.

5. The mere fact that an employé was injured without fault on his part does not raise any presumption of negligence in the employer; citing *Prentiss v. Furniture Co.*, 63 Mich. 478; *Henry v. Railway Co.*, 49 Id. 495.

6. Defendant's duty to its employés is to exercise due care in the selection and retention in its employment of competent and trustworthy persons as their fellow-servants, and in order to recover plaintiff must show affirmatively some delinquency in this respect on its part; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Scripps v. Reilly*, 38 Id. 10; *Mining Co. v. Kitts*, 42 Id. 34; *Smith v. Railway Co.*, 46 Id. 258; *Hilts v. Railway Co.*, 55 Id. 437; *Catlin v. Railroad Co.*, 66 Id. 358.

7. Plaintiff's attempt to make the coupling with his hand instead of by the use of a stick, as required by the rule of defendant, was of itself gross contributory negligence, and prevents a recovery; citing *Lyon v. Railroad Co.*, 31 Mich. 429; *Gardner v. Railroad Co.*, 58 Id. 584; *Wolsey v. Railroad Co.*, 33 Ohio St. 227.

Frank A. Rodgers (*M. L. Dunham*, of counsel), for plaintiff, contended:

1. There was surely some evidence, indeed much evidence, touching the question of negligence, and it was for the jury to say what its value was; citing *Wisner v. Davenport*, 5 Mich. 501; *Brooke v. Railway Co.*, 15 Id. 332; *Railroad Co. v. Van Steinburg*, 17 Id. 99.

2. As corporations can only act through superintending officers, their negligence with respect to other servants is that of the corporation; citing Whart. Neg. § 232; *Railroad Co. v. Herbert*, 116 U. S. 642; *Shanny v. Androscoggin Mills*, 66 Me. 420;

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Fuller v. Jewett, 80 N. Y. 46; *Sheehan v. Railroad Co.*, 91 Id. 334.

3. Notice to a defendant corporation can be proved by showing notice given to its officer, or agent who was at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, or to one whose duty it was to receive and communicate information to his principal; citing Abbott, Trial Ev. 45; *Hough v. Railway Co.*, 100 U. S. 213; *Pantzar v. Mining Co.*, 99 N. Y. 368; *Corcoran v. Holbrook*, 59 Id. 517.

4. That there are several agents who act jointly in the conduct of the business with reference to which it is sought to effect the principal with notice does not render it necessary, in order to charge him, to bring home to all the agents a knowledge of such facts. Notice to one will be as effectual as notice to all; citing *Bank v. Canal Co.*, 4 Paige, 127; *Bank v. Aymar*, 3 Hill, 262.

CAHILL, J. This action was brought to recover for an injury to the plaintiff, while in the employ of the defendant as switchman at Grand Rapids, on September 6, 1888. The declaration contains five counts, but upon the trial the plaintiff claimed to recover only upon the first and third counts.

The first count alleges that the plaintiff was, as his duty required, on the foot-board in the rear of the switch-engine, and was directed by the defendant to couple to and remove a freight-car then standing on the railroad track in the yard, about six feet distant from the engine, and for that purpose the plaintiff signaled the servant of defendant in charge of the engine to move the engine slowly back to the freight-car, and that the defendant or its servants having charge or control of the engine,—

"Not doing its duty in this behalf, and disregarding the motion or signal so given as aforesaid by said plaintiff, so carelessly, negligently, and unskillfully started said engine with a full head of steam, thereby causing said engine to move suddenly and with great force against said freight-car, and by reason of the accelerated motion, and by reason of the carelessness and negligence of said

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defendant and its servants, this plaintiff was thrown off his balance on said foot-board, and causing him to fall or pitch forward, whereby his arm was caught at the wrist between the draw bar of said engine and the bumpers of said freight-car, and the hand of said plaintiff crushed and severed from his body."

The third count sets up the duty of the defendant to employ sober, careful, and competent men as engineers, switchmen, and firemen. It avers that defendant did not employ a careful and sober man and put him in charge of the engine,—

"And did employ and put in charge of said engine one David Moore, who was careless and negligent in the discharge of his duties, and who was in the habit of using intoxicating drinks, and who was in the habit of causing or permitting unskilled and unsuitable persons to run and manage the said engine in the business of the said defendant, and had thus been careless and negligent, and in such habit as above set forth, and of using intoxicating drinks, for a long space of time prior to the 26th day of July, 1888, to wit, for a period of one year prior to said 26th day of July, 1888, all of which was well known to said defendant, and was then and there unknown to the said plaintiff."

It then proceeds to state that the plaintiff, in the exercise of his duties, was standing on the foot-board at the rear of the engine, and was called upon to couple thereto and remove a certain freight-car standing on the railroad track in the yard, about six feet distant from the engine, and that, for the purpose of making the coupling, plaintiff signaled the defendant and its servant, the said David Moore, then in charge of the said engine, to move the engine back to the freight-car slowly, but that said defendant, by and through its said servant and engineer, David Moore, disregarded its duty to cause the said engine to be managed with due care, and by a skilled and careful man, and to be run slowly and quietly back to said car, and, disregarding said plaintiff's signal,—

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"Caused and permitted one who was not the engineer, but was a raw and unskilled fireman on said engine, to run and manage the same, and, by and through the said fireman, did start the said engine too quickly and with too much force and speed, and caused said engine to be dashed against said freight-car with great violence, and thereby, without any fault or negligence on the part of said plaintiff, he, the said plaintiff, was caused to lose his balance and pitch forward against said car, and, by the rebound of said car against said engine, the hand of said plaintiff was caught between the draw-bar of said engine and the bumper of said car, and was crushed in such manner and to such an extent as to make amputation thereof necessary."

And it avers that the accident was caused by the negligence of the defendant in putting and continuing said Moore in charge of said engine, and by the carelessness and negligence of said person in charge of the engine, and for want of due care and attention to the signal given by the plaintiff.

The evidence on the part of the plaintiff showed that the accident occurred on September 6, 1888, in the afternoon. The plaintiff had been in the employ of the defendant as switchman in the yard at Grand Rapids, about 11 days. Previous to that he had been employed in the freight-house of the Grand Rapids & Indiana Railroad Company at Grand Rapids for about three years, and during that time had coupled cars. At the time of the accident, the plaintiff was standing on the foot-board at the rear of the engine. David Moore, the engineer, was on the engine, and the fireman, also named Thompson, was operating it under the direction of the engineer. The engine was on a side track leading from a point in the yard north of Fulton street, and southward across Fulton street. Upon this track there were several cars to be removed. The engine was to the north of the cars, and was backing down to couple to and remove them.

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The engine was backed down slowly in obedience to signals made by plaintiff until it struck the car. The plaintiff failed to make the coupling, and the car was moved by the concussion a distance of 1½ car-lengths. The engine stopped within about four or five feet of the car. The plaintiff, being still on the foot-board, again signaled for the engine to back, and took the coupling-pin in his hand to enter it into the head of the draw-bar of the car. The engine backed up and struck the car. The evidence is conflicting as to whether it struck the car hard or otherwise. It is also conflicting as to whether plaintiff was injured at this time. The plaintiff himself testified as follows:

"*Q.* When you missed that coupling—failed to make the coupling—what did you do? You said that the car run forward some fifty feet or such a matter, and that the engine followed after it. Now, take up the statement at that point and go on and state what you did then.

"*A.* Well, as the car run ahead, the engine followed until I got across the sidewalk of the street, and she stopped, and the car was moving just as though it was about to stop. I noticed the wheel and I took hold of the link, and I raised my hand for him to back up, and the engine jumped, and that was the last I knew of it.

"*Q.* What do you mean by 'the engine jumped?'

"*A.* Gave a sudden jerk."

Other witnesses testified that the second contact between the engine and the car caused the empty car to strike the end of the car next south of it, standing on the south side of Fulton street, and to rebound toward the engine; and on the rebound, and while both the engine and car were moving toward each other, the plaintiff again attempted to make the coupling, and in this third attempt his hand was injured. After the evidence was all in, the defendant requested the court to instruct the jury that the plaintiff could not recover,

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which request was refused. The case was submitted to the jury, who found a verdict for the plaintiff.

The only error assigned relates to the refusal of the circuit judge to charge as requested by defendant's counsel. The undisputed evidence is that, at the time of the accident, the engine was being operated by Frank Thompson, the fireman. The negligence relied on by plaintiff as the immediate cause of the injury was the unskillful handling of the engine by Thompson. Plaintiff testified that at the critical moment when he was about to couple the car the engine jumped or gave a sudden jerk, which caused him to miss his calculation, and caught his hand between the draw-bar of the engine and the car. If this were all that were in the case, clearly the plaintiff could not recover. The fireman was a fellow-servant in this general employment, and his negligence was one of the risks which the plaintiff assumed when he accepted employment from the defendant. The theory of the plaintiff's case was that the engineer, Moore, was habitually negligent and untrustworthy, and that he frequently allowed incompetent persons to run his engine, and that on the occasion in question his allowing the fireman, Thompson, to operate the engine was the direct cause of the injury. The evidence of the engineer's incompetency and untrustworthiness is very slight. Some of the plaintiff's witnesses testify that he sometimes disregarded the signals of the switchmen in the yard; that he was in the habit of having visitors upon the engine, and, at times, went away and left it entirely in the control of his fireman. On the contrary, the testimony for the defendant showed that Moore had been employed as engineer in the same yard since 1873, and that during that time no one had been injured by his engine before the plaintiff, and that no serious injury to property had been caused through his negligence. His superior officers testified to his being a

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sober, reliable man, and a skillful engineer. But the previous negligence of the engineer, if established, was not important unless he was also shown to have been negligent at the time of this injury.

The only allegation of negligence connecting the engineer with the plaintiff's injury is that which charges that it was negligent for him to allow the fireman, Thompson, to run the engine. It is not contended that it is necessarily negligent to allow the fireman to run the engine. The proof showed that this is customary, and sometimes necessary, and that it is the way in which firemen are educated to be engineers. If it is ever safe to allow a fireman to handle an engine, it must be when, as in this case, it is done under the immediate direction of the engineer. Whether it was negligent to allow this particular fireman to run the engine, or not, must depend on whether he had had such experience in the work as to make him reasonably safe and fit for it. There is no evidence of his unfitness. The plaintiff put in no evidence on the subject, but the defendant put in evidence that he had been employed by the defendant about 20 months as a fireman, and 6 months as a brakeman; that he had been accustomed to handling the engine on which he was at work more or less, and that he was entirely competent to do so. That being so, there was no evidence to show that Moore, the engineer, was guilty of negligence in allowing the fireman to operate the engine on the occasion in question. As this was the gist of the plaintiff's action, the entire failure of proof upon this point made it the duty of the circuit judge to direct a verdict for the defendant.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

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MURRAY LYTTLE v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Master and servant — Negligence — Fellow-servants — Incompetent employé—Notice—Assumption of dangers—Evidence—Matters equally within knowledge of deceased officer of corporation.

1. A yard-master who has full charge of the yards of a railroad company, and hires and discharges the men employed therein, and assigns them to their labor, is the agent or vice-principal of the company in this respect, as well as in furnishing proper, suitable, and safe appliances and places for their labor; and notice to him of defects in the appliances so furnished is notice to the company, which is chargeable with his negligence, and responsible for his promise to remedy such defects, and to see that an incompetent fireman shall not handle an engine while switching is being done, upon which promise the switchman complaining of such defects and incompetency has a right to rely for a reasonable time, and to a reasonable extent. *Mining Co. v. Kitts*, 42 Mich. 34; *Ryan v. Bagaley*, 50 Id. 179; *Rodman v. Railroad Co.*, 55 Id. 62, 59 Id. 395; *Slater v. Chapman*, 67 Id. 523; *Luke v. Mining Co.*, 71 Id. 364; *Van Dusen v. Letellier*, 78 Id. 492; *Harrison v. Railroad Co.*, 79 Id. 409; *Brown v. Gilchrist*, 80 Id. 56.

2. The rule that a servant in entering a service accepts the ordinary hazards and dangers of his occupation, and that if, with knowledge of defects in the machinery and appliances furnished by the employer, or of the unusual dangers of the occupation, he continues in the employment, he will be regarded as assuming the dangers, and cannot recover for injuries arising therefrom, does not apply to a case where the employer (a railroad company) is notified by a switchman of the incompetency of a fireman who has been permitted to operate an engine in switching cars, and who refuses to work if the fireman is allowed to continue so to do, and who, in reliance upon the promise of the company that he shall not, continues his work, and is injured while the fireman is running the engine without his knowledge, the immediate cause of such injury being the negligence of the fireman.

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3. The charge of the court, which is set forth in the opinion, is held to embody the law of the case.

4. How. Stat. § 7545, which excludes the testimony of a party to a suit which is prosecuted or defended by a corporation, in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within that of any surviving officer or agent, is held not to apply to the testimony of a plaintiff in a negligence case against a railroad company to an interview with the yard-master, since deceased, in the presence of the master of the round-house, who survives him.

Error to Kent. (Burch, J.) Argued December 5, 1890. Decided December 24, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

Smedley & Irwin, for plaintiff.

MORSE, J. On June 19, 1886, the plaintiff was in the employ of the defendant as a switchman in its yards at Muskegon. He had been in such employment since February of the same year, and had an experience of about three years before that time as a switchman for the company. While on the foot-board at the rear end of a tank to a locomotive, the engine running backwards, he was injured in attempting to uncouple cars. He brought suit against the defendant in the Kent circuit court, and recovered a verdict of $4,000.

At the close of the plaintiff's case, the defendant moved that the court direct a verdict in its favor, on the ground of the contributory negligence of the plaintiff, and also for the reason that the evidence did not tend to show any negligence in the defendant, as alleged in plaintiff's declaration. The declaration was in four counts, and

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charged negligence on the part of the defendant in the following particulars:

1. In not providing a hand-rail across the rear end of the tender of said locomotive, after complaints made, and a promise by defendant that it would be provided.

2. In not providing the tender of said locomotive with a proper foot-board at the rear end thereof, in a reasonable state of repair, after notice to defendant of its defective condition, and a promise that the same would be repaired.

3. In allowing an unskillful and incompetent person to run and operate the said engine, after complaints made to defendant, and a promise on the part of defendant to plaintiff that, if he would continue in its employ, said unskillful and incompetent person should not run the engine any more.

4. And the fourth count of said declaration is a combination of all the above-alleged acts of negligence.

The motion was overruled, and the defendant thereupon submitted testimony in its defense.

On the trial, the plaintiff introduced evidence tending to show that the switch-engine with which he was working was defective in that it had no hand-rail on the rear part of the tender, where it is customary to have such a hand-rail for the men to take hold of in getting off and on, "in case they were to fall, or anything;" that the foot-board was out of shape. This is the step at the rear of the tank. It was supported by two heavy irons, bent at the bottom to place the step on. These irons were bent back so they touched the brake beam, and the corner of the step was broken off, leaving it in bad shape.

"The end of it was bent down towards the track, and then it sloped instead of standing level; it was bent down, and then sloped down towards the track. A hand-rail is an iron rail, and is fastened to the deck of the tank. The deck of the tank is the platform the tank sets on, and it projects out; and a hand-rail is arch-shaped,

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and goes right down through these timbers, and fastened."

On the night of June 10, having previously complained to his foreman, Martin Shannon, he reported these defects to the yard-master, McKiever (now dead), and was about to quit work, as he informed McKiever, on that account. McKiever told Pease, who plaintiff supposed was the assistant master mechanic, that it was dangerous, and he wanted it fixed, and Pease promised to fix it the next Saturday night. Relying on this promise, plaintiff kept at work expecting the defect to be remedied. He swears he would not have continued in the employ of the company if it had not promised to fix it. He also complained to Shannon about the fireman, one Marine Hector, running the engine, that he was not fit to handle an engine, and he would not work behind the engine if he was going to run it. He also reported to McKiever, who told the engineer to keep his place, that the fireman was not to handle the engine. The plaintiff and another switchman, George Race, quit work, and were about leaving the yard when McKiever asked them what was the matter, and plaintiff told him he was not going to work any more if the fireman was going to handle the engine. McKiever said if they would go back to work he would see that the fireman did not run the engine any more. At the time the plaintiff was hurt, this fireman was running the engine, the engineer having stepped off for a few moments. The testimony on the part of the plaintiff tended to show that Hector was an incompetent man to handle the engine, and did not understand the signals.

"He imagined he saw a signal when he didn't. Sometimes he would shut it off and stop without a signal, and sometimes go ahead without a signal, and that was the reason we complained that he was not fit to handle the engine."

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Plaintiff testifies that he continued work in this instance for the reason that they agreed not to let the fireman handle the engine.

There was a box about six inches wide by two inches thick running the width of the tank. It was his custom, when getting on the foot-board, to take hold of the front end of this box, which gave him some security, but, at the time of the injury, a portion of the top of the box was split off, so that he could not hold on to it. It was broken off that morning. The box was not put there to take hold of, but to carry tools in, links and pins. At the time of the injury, about 10 o'clock in the forenoon of June 19, 1886, the engine was backing at the rate of five or six miles an hour, pushing three freight-cars. Plaintiff stepped on the foot-board on the right-hand side of the engine, which was going in a southerly direction, and was reaching for the coupling pin to pull it in order that the cars might be "kicked in" on a side track by the momentum given them by the engine. As plaintiff was about to pull the pin, the fireman suddenly shut off steam and reversed the engine, without any signal from the plaintiff, and without giving him any notice of his intention to do so. The sudden stopping of the engine took up the slack between the tank and the car to which it was attached, plaintiff was thrown violently forward, and, having nothing to catch hold of or hang on to, lost his balance, and fell upon the track. One of the wheels ran over his right foot, making amputation necessary at the ankle joint.

It is also evident from all the testimony that the injury to plaintiff was occasioned by the defect in the step, or foot-board, and the absence of a hand-rail, or something to take hold of, together with the action of the fireman in shutting off the steam. This act of the fireman was the immediate cause of plaintiff's fall,

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although, if it had not been for the defects spoken of, he might perhaps have saved himself. The fireman, a witness for the defendant, testifies:

"When I shut off the steam, it took up the slack between the tender and the car. Lyttle did not lose his balance until the steam was shut off."

There can be no fault imputed to the plaintiff, except in that he used the step and undertook to do the uncoupling knowing of the defects that existed, and the want of a hand-rail; but he testified that he had used it about 100 times a day for a week ending that day without being jerked off or falling off.

"There would have been no danger to me in the use of the tender if it had not been for that sudden jerk. * * * I was jerked so I was falling, and had to get out, or go under."

It appears from the evidence that McKiever had full charge of the yards, and hired and discharged the men therein. He had full notice by plaintiff's showing of the defect in the step, and the want of a hand-rail, and of the incompetency of the fireman to handle the engine while switching was being done with it. The court correctly charged the jury that notice to McKiever was notice to the defendant, and that his negligence was the negligence of the company.

It is contended that the yard-master was a fellow-servant of the plaintiff; but he was in no proper sense such a co-employé that his negligence would not bind the company. In these yards he represented the company. He it was who hired and discharged the men, and directed and assigned them to their labors; and he was the agent or vice-principal of the defendant in this respect, as well as in the furnishing of proper, suitable, and safe appliances and places for their labor. His promise to remedy the defects in the engine, and to see that the fireman

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did not run the engine, was the promise of the company, and plaintiff had a right to rely upon it for a reasonable time, and to a reasonable extent. See *Van Dusen v. Letellier*, 78 Mich. 492; *Brown v. Gilchrist*, 80 Id. 56; *Slater v. Chapman*, 67 Id. 523; *Quincy Mining Co. v. Kitts*, 42 Id. 34; *Ryan v. Bagaley*, 50 Id. 179, 180; *Rodman v. Railway Co.*, 55 Id. 62, 59 Id. 395; *Luke v. Mining Co.*, 71 Id. 364; *Harrison v. Railroad Co.*, 79 Id. 409.

The defendant invokes, against the validity of this verdict, and any recovery by the plaintiff, the familiar rule that a servant in entering a service accepts the ordinary hazards and dangers of his occupation, such as are incident to it, and for an injury sustained through such danger cannot recover; and also another rule that, although there are defects in the machinery, appliances, or structures furnished by an employer, or the dangers of the occupation are unusual, still if the employé knows of the defects, or of the dangers to be encountered, and continues in the employment, he will be regarded as assuming the dangers, and will not be permitted to recover for injuries arising therefrom. But neither of these rules applies to the plaintiff's case. There was testimony tending to show that the fireman was incompetent to run the engine while switching; that the employer was notified of such incompetency; that plaintiff refused to work if the fireman was permitted to handle the engine; that such employer promised that the fireman should not run the engine, and, upon such promise, plaintiff continued his work; that the immediate cause of his injury was the negligence of this fireman while plaintiff did not know he was running the engine. It is true, this testimony was disputed and in part rebutted by the defendant, but this issue was for the jury; and, if they found with the plaintiff, he was entitled to recover on these facts alone.

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In reference to the want of a hand-rail and the defect in the foot-board, the court instructed the jury that the defendant was not bound to furnish the locomotive tender with an iron rail at its rear; it could lawfully use said tender with an open box, such as it was originally provided with, and it was not responsible to the plaintiff for any injury occurring in consequence of continuing the use of said locomotive tender after a part of the outer board of said box, and which the plaintiff had before used as a handle, had, with his knowledge, been broken off, if they found that the box was a thing which furnished him with reasonable safety of itself, whatever the condition of the other surroundings was, and that, by reason of its being broken off, he no longer had any safety, and that he had not brought it to the attention of the company, but had continued to use it thereafter. He also instructed them that the defendant was under no legal obligation to furnish a hand-rail, and that the plaintiff could not recover under the first count of the declaration. The court further instructed the jury as follows:

"The defendant company were bound to furnish for these employés, and for the transaction of its business, reasonably safe and proper rolling stock and locomotives, and reasonably safe appliances thereto, and a competent engineer and fireman. All the circumstances and the nature of the employment being considered, they were bound to do this, and what is reasonable in that respect is left to the jury as a matter of fact to find. But there is no obligation on the part of the company to furnish the best that can be procured of either machinery or men; and, in entering upon the employ of a company, an employé is presumed to know at least as much upon that subject as may be observed by a person having a reasonable degree of experience in the employment upon which he enters. If, therefore, you find that the defendant company did provide upon its locomotives reasonably good, upon this locomotive reasonably good, appli-

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ances for the purpose for which it was used,—I may say appliances for the purposes for which they were used,—and kept them in a good state of repair, and a reasonably good engine-driver for the purpose in the person of the fireman, who was at the time running this locomotive, then the plaintiff cannot recover. If you find that the company did not furnish suitable locomotives, or attachments thereto, or appliances therefor, for the purposes shown in this case that it was used for, or a competent engineer and fireman, and the plaintiff knew it, or had reasonable opportunity to know it, and did not impart such information to the company, then plaintiff cannot recover.

"If you find from the evidence that the plaintiff was reckless or careless in his employment, and that such recklessness or carelessness or negligence on his part contributed in any wise to the injury, then, under the law as it exists in this State, he cannot recover; that is, if he has been guilty of what we call 'contributory negligence,' he cannot recover."

"If you find that plaintiff, while in defendant's employ, learned that the switch-engine upon which he was working was defective and dangerous, and stated to the yard-master that unless the defects and dangers were removed he would quit work, and the yard-master promised to remedy the defects and remove the dangers, and requested the plaintiff to continue work on a defective and dangerous engine, and that the plaintiff, relying on such promises, continued in the employ of the defendant for a reasonable length of time thereafter, and while in the exercise of due care, and without fault on his part,—I add these words 'without fault on his part,'—was injured by reason of such danger not being removed, and such defects not being repaired, plaintiff is entitled to recover. As to what would be a reasonable time to continue in the use of an alleged defective switch-engine after promise to repair was made, if you find that it was made, which he claims, would depend on the circumstances of the case; as, for instance, the frequency with which the engine was used, the danger of using it while out of repair, if you find it was out of repair, and the opportunity which the defendant had for repairing it, etc.; you are to say, after considering all these circumstances of the case, whether plaintiff acted reasonably and ordinarily prudent in continuing in the use of this alleged defective and danger-

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ous switch-engine during the time which he did use it.

"If you find that the plaintiff, while in the defendant's employ, learned that the fireman was running the engine in a careless, reckless, and incompetent manner, and stated to the yard-master that he was going to quit work if the fireman was going to be allowed to run the engine, and the yard-master told the plaintiff to continue work, and he would see that the fireman did not run the engine any more, and that the plaintiff, relying on this promise, continued in the employ of the defendant, and, while in the exercise of due care, was injured by reason of the fireman's running the engine in the manner aforesaid, plaintiff is entitled to recover."

These instructions correctly embodied the law of the case. Cooley, Torts, 559; *Hough v. Railway Co.*, 100 U. S. 225; *Brabbits v. Railway Co.*, 38 Wis. 289; *Conroy v. Iron Works*, 62 Mo. 35; *Furnace Co. v. Abend*, 107 Ill. 45; *Greene v. Railway Co.*, 31 Minn. 248 (17 N. W. Rep. 378); *Hoffman v. Dickinson*, 31 W. Va. 142 (16 S. E. Rep. 53); *Laning v. Railroad Co.*, 49 N. Y. 521; Shear. & R. Neg. § 96.

It is also argued that the court erred in permitting the plaintiff to testify to matters equally within the knowledge of McKiever, the yard-master and officer or agent of the corporation defendant, who was deceased at the time of the trial. The court on motion struck out all the testimony of plaintiff in reference to what occurred between him and McKiever, except that part of his evidence which related to an alleged interview between McKiever and Pease, the master of the round-house, in the presence of the plaintiff and Race, and instructed the jury not to regard it. The court committed no error in this respect. The statute (How. Stat. § 7545) under which this evidence was sought to be excluded reads as follows:

"And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be permitted to testify at all in relation to matters which,

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if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, *and not* within the *knowledge of any surviving officer or agent of the corporation,"* etc.

Under this statute, the interview between McKiever and Pease, and what was said there, was admissible. The record shows that George Race testified to the same facts as to the complaints to and promises of McKiever as did the plaintiff, he being present with him, and the case of the plaintiff in this respect did not depend alone upon his own testimony.

The judgment of the lower court is affirmed, with costs.

The other Justices concurred

JOSEPH JACOBS v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

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Master and servant—Negligence—Assumption of risk.

A verdict is held to have been properly directed for the defendant in this case, as, under the undisputed circumstances, the plaintiff must be held to have accepted the risk of the caboose-car, in which he was sleeping while it was standing upon an extension track used during the night to shove cars in upon, being struck by such cars, and therefore to have no cause of action on account of injuries received in consequence of such collision.

Error to Kent. (Grove, J.) Argued December 3, 1890. Decided December 24, 1890.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

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Godwin, Adsit & McKnight, for appellant.

FitzGerald & Barry, for defendant.

MORSE, J. The theory of plaintiff's declaration in this case is that, while he was engaged in the employ of the defendant as a brakeman, the defendant agreed to and did furnish him a place in one of its cars to sleep nights while he was so employed, which said car was to be and remain on a side track of the defendant company in a convenient and safe place, for the use of the plaintiff to sleep in, out of all danger of passing trains and engines when so occupied by plaintiff; and that it became and was the duty of defendant to furnish said plaintiff a safe and reasonable car, and a safe place for the same, free from all danger, and to maintain a separate track for said car while used for sleeping, and for no other purpose, as is the custom, for the protection of said plaintiff while so sleeping, and so to conduct its business as not to strike or in any way interfere with said car while so used for sleeping purposes, and to use all due and reasonable care and caution to prevent any striking of said car and injury to plaintiff thereby; but that defendant neglected its said duty, and on October 3, 1888, the said car was placed upon a side track, but which track was used for business purposes, yet apparently out of all danger of being struck by passing trains and moving cars; and plaintiff, being informed by defendant that the car was in a safe place, and out of danger, went to sleep therein. He alleges that, without any fault of his own, and through the negligence of the company in not maintaining a separate track for said car, and in running an engine and cars against the car, in which the plaintiff was sleeping, in a violent, unguarded, and negligent manner, he was severely injured. It is also alleged in one of the counts that the defendant granted permission

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to the plaintiff to sleep in and occupy one of the cars used for that purpose, and agreed with him that, while he was in the employ of the defendant, he might occupy said car for sleeping purposes; and that, for the convenience and profit of both plaintiff and defendant, the defendant agreed that there should be always located, at a convenient and safe place upon the line of its railway, a car for the occupancy of the plaintiff for sleeping purposes; and that, relying upon such agreement, he was sleeping in the said car at the time of the injury; and further, alleging, substantially, the same duty and neglect as hereinbefore stated.

At the close of the plaintiff's proofs, the court directed a verdict in favor of the defendant.

The plaintiff's case as made by the testimony is substantially as follows: Jacobs was employed as a brakeman upon the line of defendant's road running from Grand Rapids to White Pigeon. He lived at Grand Rapids, and when he was there stayed overnight in his own house. He commenced work in the spring of 1888. He was employed by and got all his orders from his conductor, Charles Lynde, who kept his time. He received his pay from month to month from the company pay-car, and never talked with or received any directions from any officer of the company save this conductor. When he hired out as brakeman, he asked Lynde, "whether it was the same thing, sleeping in cars, like it had been years before." In reply, Lynde told him to bring his bedding and sleep in the cars. Plaintiff testified that Lynde said that it was customary to sleep in the cars as it had been before when plaintiff had been on the road. Plaintiff had been a brakemen on the same road between Grand Rapids and White Pigeon 16 years before, when, he testified, it was the custom of the brakemen to sleep in the caboose-cars. He took his bedding into the caboose-car

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some six weeks after he commenced work in 1888, before that time sleeping in the car, but using bedding belonging to others. This "caboose-car," as it was called, was part of a coach, and a part was the conductor's office and a washing-room. One end of it was furnished with seats, and used for passengers, and for the men to sleep in. Another brakeman slept in the car with plaintiff. When the car stopped overnight, it was run upon a side track, which was used for the storing of cars. The defendant used the track more or less while plaintiff was sleeping in this caboose-car to put in and take out cars during the night. The plaintiff was well aware of this practice, and testified that sometimes they would run against his car and push it down the track, but could not remember how many times it had been struck before the night he claims to have been injured. On the night of October 3, 1888, plaintiff was awakened by a "terrible jar" between midnight and 4 o'clock in the morning. He had been asleep lying on his back in his bunk. His head was towards the car that struck the one he was in. He thinks "it drove his head against the end of the seat." He woke up with a pain in his neck and head. It affected him so he thought his neck had been broken. There were two other men sleeping in the car. They were not injured, and did not get up. The car in which they slept was moved but little, if any. It is claimed that plaintiff's neck was partially dislocated, and that a severe and permanent injury had resulted from this collision of the cars and jarring of the plaintiff.

It was attempted to be shown that it was the custom of this railroad company, and of all the others in this State, to furnish and maintain separate tracks upon which to place these caboose or sleeping cars,—tracks upon which no business was done while these cars were being used for sleeping purposes,—but no such custom

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was established by the testimony. The plaintiff's counsel insist that it was the duty of the defendant to maintain a separate track for the caboose-cars for the men to sleep in at the terminal points on the road. We do not think the duty is shown in the present case. There is no testimony tending to show that, previous to the injury to the plaintiff, any such separate tracks were maintained by the defendant, and the fact that after this accident happened the company did build and maintain such separate track at White Pigeon has no bearing upon the duty of the defendant to the plaintiff before that time. Nor is the agreement on the part of the company to provide an absolutely safe place for the car in which plaintiff was sleeping, free from all danger of such car being struck or run against by moving engines and cars, made out by the testimony.

The plaintiff shows how he first came to sleep in the cars on this road as follows:

"*Q.* Do you know of your own knowledge whether there was the same custom or a similar manner of sleeping in cars on the other divisions of this Michigan Southern Railroad?

"*A.* I do. I know by my own knowledge, for I have slept in them before in the division between Elkhart and Chicago.

"*Q.* Now you may state whether or not a similar custom exists on the other divisions of the road.

"*A.* About sixteen, 15 or 16, years ago, in that neighborhood, I was at Elkhart, and hired out to a Lake Shore Company conductor for to brake on the west end there, from Elkhart to Chicago. I hired out in the afternoon, between three and four o'clock, and he took me to the caboose track and showed me the car, and he says: 'There is our car. There is where we make our home, in there. You can sleep in there. You can cook your meals in there, if you want to buy your own provisions, and go in there and cook them.' I did not do any cooking in there, but I slept in there from the time until the train left, which was called there 11:45—almost

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midnight—and went to Chicago. I only made two trips on that division. I came back on the Kalamazoo division, and have only worked on two divisions on the road. I do not think I have ever been over the other divisions of the road during that time. What they call the main line between Chicago and Toledo runs through White Pigeon, only the Kalamazoo division terminates at White Pigeon."

He further testified that on his last hiring the conductor gave him the privilege of sleeping in this car. When asked if he did not sleep there for his own convenience, he answered:

"I slept there in the car just as much for my own accommodations as I did for the company; for I would suppose that if I was wanted they would find me in the car."

He further testified that he did not sleep on the car when at Grand Rapids, because he had a better bed at home, but could not answer why it was not equally beneficial for the company that he should sleep in the car at one place as the other.

It is evident that the permission or privilege to sleep in the car was granted to him in the situation that the car was, with all the risks pertaining to its situation and condition on the track, and subject to the natural and ordinary risks of the business customarily done upon the track where it was left during the night. It appears that during all his last employment before the accident to him this car was invariably left upon the same track, which was a long extension track, and the first track south of the main line track. This extension track was used during the night to shove cars in upon, and this would push the caboose-car further down the track. This was a matter of which plaintiff well knew, but he testifies that he did not feel afraid of any injury therefrom. On this particular night it appears that the brakes

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of the caboose-car were very firmly set, so that it was scarcely moved, if at all. The car that struck it stayed there, and was a car manifestly shoved in upon the track according to the usual custom and practice of the defendant. It may have been shoved in with more force than usual, or the caboose-car may have offered more resistance than usual. The other persons were not injured in the slightest, and neither they nor the plaintiff thought the occurrence of sufficient importance to be examined for its cause at the time. None of them got up and went out of the car until morning.

The character of the hurt to plaintiff, if it was caused by this jar of his car, is somewhat remarkable. He kept right on at work for the defendant the rest of the month of October, and slept in the car as usual. He reported the matter to no one save the conductor. There began the next day a swelling upon his neck, which kept growing until it was "as large as the size of a hen's egg." The company's physician came to see him four or five weeks after the accident. It does not appear that he consulted any physician before that time, and the physician of the defendant did not come at his solicitation, but was sent to examine him by the company. The injury according to his testimony and that of several physicians, at the time of the trial, showed a partial dislocation of his neck, and a general and permanent weakness of body as a probable result of such injury. If this condition is traceable to this accident, the injury must have been caused by the position in which the plaintiff was lying when the collision occurred, as it is evident that the jar was not such as would ordinarily have done such an injury to a person sleeping in the car.

But in law, under the undisputed circumstances, the

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plaintiff, knowing the practice and custom of the defendant, and that such collisions were liable to take place thereby, and that it was a dangerous place to sleep in, in view of such practice of shoving cars upon the track and against this caboose-car, must be held to have accepted the risk of such collisions, and therefore has no cause of action on account of injuries received in consequence thereof. *Mich. Central R. R. Co. v. Austin*, 40 Mich. 247; *Richards v. Rough*, 53 Id. 212; *McGinnis v. Bridge Co.*, 49 Id. 466; *Swoboda v. Ward*, 40 Id. 420; *Lindstrand v. Lumber Co.*, 68 Id. 261.

The judgment of the lower court must be affirmed, with costs.

The other Justices concurred.

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MORDECAI L. MEADS v. ELIZABETH C. MARTIN.

Married women—Liability for goods purchased and services rendered.

This case is ruled by *Hirshfield v. Waldron*, 83 Mich. 116, in which it was held that a married woman is liable for the price of clothing purchased by her for a minor son, and charged to her by her direction, she agreeing to pay for the same.

Error to Eaton. (Hooker, J.) Argued December 4, 1890. Decided December 24, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Irving W. French and *Jacob L. McPeek*, for appellant.

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James M. Powers, for defendant.

CHAMPLIN, C. J. This was an action of *assumpsit* brought by the plaintiff, who is a physician, a druggist, and grocer, to recover for medical services, drugs and medicines, and groceries furnished to the defendant.

It appeared upon the trial that the defendant was a married moman living with her husband, and that they had six children, all under 21 years of age. The action was upon an open account, which, by the bill of particulars, appears to have originated in 1876, and to have extended down to the time of the commencement of suit, a period of nearly or quite 14 years. The plaintiff showed that he, at or about the time the account was opened, was sent for as a physician to attend upon some one of the family of the defendant; and that, in response to such call, he went to the family, and at that time had a conversation with the defendant. He proposed to show that he would not have rendered his services or sold or delivered any goods to the defendant or her family upon the credit of her husband, for the reason that he was not worthy of credit, and was without means. He stated that he expected to be able to show that at the time the plaintiff went there the defendant stated that her husband was entirely irresponsible, and that she would become responsible for his pay; and that, relying upon that promise to pay, he rendered the services and procured the drugs in pursuance of that contract with him,—that the husband was entirely irresponsible, and he need not look to him, and she would see that he had his pay. He also proposed to show that, upon the services being rendered and the goods sold and delivered to the defendant for her family, he gave the credit upon his books directly to the defendant; and that he would

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not have rendered the services or parted with the property on the credit of the husband.

The court, upon these propositions being made, stated that he understood the rule to be that, before liability could attach, it must appear that the husband actually did refuse, or its equivalent, to furnish necessaries for the family, and that the wife could not be made liable unless such was the case. It appears from the testimony also, it may be added, that the defendant was possessed of property in her own name and right.

The question involved in this case was recently before this Court, and an opinion handed down on November 14 last, in the case of *Hirshfield v. Waldron*, 83 Mich. 116, and it will not be necessary in this case to enter into any extended discussion of the proposition with reference to the power or authority of a married woman to make a binding contract with reference to the purchase of goods or for services to be performed, where she makes it in her own behalf, and upon her own express agreement to pay for such services or goods, and where she or some member of her family derives the benefit of such purchase or services.

We think the judge erred in excluding the testimony, and the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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MAGGIE HOOSE v. THE PRESCOTT INSURANCE COMPANY OF BOSTON.

Fire insurance—Authority of agent—Construction of policy—Warranties—Interest of assured.

1. An insurance company is bound by *verbal* statements made to its agent, and upon which it issues a policy and receives the premium; and it cannot repudiate in such policy the authority of the agent, or responsibility for his acts.

   So *held*, where an agent, with full knowledge that the assured was the owner of the equitable title to the land upon which the building stood upon which she verbally applied for insurance, issued a policy containing a provision that the company should not be bound by any act of or statement made to the agent not contained in the policy or the written application for insurance and other preliminary papers; which non-liability clause, under the circumstances stated, is held only to affect statements and acts of agents and others *after* the delivery and acceptance of the policy.[1]

2. A warranty in an insurance policy that any application or statement connected with its procurement is true, and shall be a part of the policy, makes an oral application, and the accompanying statements made to the agent as to the condition of the title, a part of the policy.

3. On making a verbal application for insurance, the agent was informed (as found by the jury) that the applicant held the land on which the building stood under a land contract, and that it was incumbered by a mortgage. The policy insured the applicant to the amount of $1,000 on a certain building, locating it as to streets and occupancy, against loss or damage by fire, not exceeding the *interest of the assured* in the property, which interest was not stated. The policy was to be void, unless consent in writing was indorsed by the company, if the assured was not the sole and unconditional owner of the property; or if any building intended to be insured stood on ground not owned in fee-simple by the assured; or if the interest of the assured in the property was not truly stated; or if any change took place in the title, interest, location, or pos-

[1] See *Cook v. Insurance Co.*, 84 Mich. 12; *Gristock v. Insurance Co.*, Id. 161.

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session of the property, by sale, transfer, or conveyance, in whole or in part. In a suit upon the policy the company denied the plaintiff's right to recover, because of the violation of the foregoing conditions. And it is held that, if the company had desired to know what interest it was insuring, it should have stated it in that portion of the policy pertaining to the risk; and that, to give any reasonable force and effect to the clause requiring the indorsement of its consent in the cases stated, it must be held to apply to changes in ownership arising *after* the delivery and acceptance of the policy.

4. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—In construing warranties in insurance policies, the prime object to be reached is the intention of the parties, which, when found, must control, and such warranties must be interpreted by the rules applicable to the interpretation of other mercantile contracts.

b—All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation, and wherever in a policy of insurance there is a clear breach of a warranty contained therein, however immaterial it may be, the policy will be avoided.

c—The reasons for such literal construction appear to be that insurance is granted on the faith of the accuracy of the statements made by the assured, the information concerning which is generally, and often exclusively, within his knowledge, and it is only just to an insurer, when he asks for positive and accurate information, that it should be given to him. It is in reliance upon the facts given that the contract of insurance is made, and the purpose of requiring a warranty is to dispense with inquiry, and cast upon the assured the obligation that the facts shall be as he represents them; citing *Insurance Co. v. Huntzinger*, 98 Penn. St. 41.

d—In arriving at the intention of the parties to an insurance contract, the court must look at their situation, the condition of the thing insured, and what was said or done at the time the insurance was effected. If the representations of the assured are in writing, that is the evidence of what they are; but if the application and representations are verbal, oral proof is competent to establish the same.

Error to Wayne. (Hosmer, J.) Argued December 5, 1890. Decided December 24, 1890.

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Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

E. W. Pendleton (*Thomas Bates,* of counsel), for appellant, contended:

1. In support of the claim that the restrictions in the policy upon the authority of the agent to waive any of its conditions were an express limitation upon such authority, of which the plaintiff had full notice, counsel cited *Cleaver v. Insurance Co.*, 65 Mich. 527, and cases cited; Wood, Ins. (2d ed.) § 411; *Zimmerman v. Insurance Co.*, 77 Iowa, 685; *Walsh v. Insurance Co.*, 73 N. Y. 5; *Loring v. Insurance Co.*, 8 Gray, 82.
2. Under the condition that if any change takes place in the title, interest, etc., of the property, whether by sale, transfer, or conveyance, in *whole or in part*, etc., the policy shall become void, the execution of the $300 mortgage avoided the policy; citing *Sossaman v. Insurance Co.*, 78 N. C. 145; *Edmands v. Insurance Co.*, 1 Allen, 311; *Sherwood v. Insurance Co.*, 73 N. Y. 447; *Germond v. Insurance Co.*, 2 Hun, 540; *Tatham v. Insurance Co.*, 4 Id. 136.

Walter Barlow (*George F. Robison* and *Thomas Kissane,* of counsel), for plaintiff, contended:

1. A party dealing with an insurance agent, through whom he applies for and obtains a policy of insurance, has a right to presume that material facts known to the agent are by him communicated to his principal; and notice to the agent is notice to the principal; citing *Insurance Co. v. Hall*, 12 Mich. 213; *Insurance Co. v. Olmstead*, 21 Id. 253; *Insurance Co. v. Fay*, 22 Id. 472; *Kitchen v. Insurance Co.*, 57 Id. 145.
2. In support of the claim that under the terms of the policy the giving of the mortgage did not avoid the insurance, counsel cited *Insurance Co. v. Spankneble*, 52 Ill. 53; *Insurance Co. v. Walsh*, 54 Id. 168; *Insurance Co. v. Eddy*, 55 Id. 220; *Friezen v. Insurance Co.*, 30 Fed. Rep. 357; *Loy v. Insurance Co.*, 24 Minn. 315; *Judge v. Insurance Co.*, 132 Mass. 522; *Shepherd v. Insurance Co.*, 38 N. H. 240.
3. On the question of the alleged estoppel of the company by the agent's knowledge of the situation of the property as to ownership and incumbrances, counsel cited *Insurance Co. v. Hall*, 12 Mich. 213; *Insurance Co. v. Olmstead*, 21 Id. 253; *Insurance Co. v. Throop*, 22 Id. 159; *Insurance Co. v. Lewis*, 30 Id. 44; *Kitchen v. Insurance Co.*, 57 Id. 144; *Baker v. Insurance Co.*,

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70 Id. 199; *Temmink v. Insurance Co.*, 72 Id. 388; *Copeland v. Insurance Co.*, 77 Id. 554; *Crouse v. Insurance Co.*, 79 Id. 249.

4. Plaintiff's insurable interest in the building was its full value at the time of the fire, and not the difference between such value and the incumbrances on the property; citing *Nussbaum v. Insurance Co.*, 37 Fed. Rep. 524; *Judge v. Insurance Co.*, 132 Mass. 523; *Holbrook v. Insurance Co.*, 1 Curtis, 197; *Guest v. Insurance Co.*, 66 Mich. 100.

5. A party holding land under a land contract has an insurable interest therein; citing *Crouse v. Insurance Co.*, 79 Mich. 249; *Dupreau v. Insurance Co.*, 76 Id. 615; *Guest v. Insurance Co.*, 66 Id. 98; and this is true even though no part of the purchase money has been paid; citing *Insurance Co. v. Dunham*, 117 Penn. St. 460; *Gilman v. Insurance Co.*, 81 Me. 488.

CHAMPLIN, C. J. This is an action upon a policy of insurance.

On May 19, 1888, the Prescott Insurance Company, through Howard W. Sterling, who, at that time, was its agent at Detroit, issued to Margaret Hoose its policy of insurance, covering $1,000 on building corner of Milwaukee avenue and Beaubien street, in Detroit, $1,500 on a stock of groceries, provisions, cigars, etc., contained in said building, and $500 on store furniture, fixtures, counters, shelves, show-cases, and scales; the policy running one year. A fire occurred on March 20, 1889, by which the building was destroyed, together with certain personal property.

On February 19, 1886, Margaret Hoose by deed conveyed the building described in the policy sued on, together with the lot on which it stood, to her son-in-law, George W. Morgan, to secure, as Morgan testifies, $2,000 which he loaned "to the family;" and, at the time it was given, he gave back to Margaret Hoose a land contract, which provided that he was to convey the property back when Margaret Hoose paid him $2,000, with interest at 7 per cent. On July 24, 1888, at Margaret

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Hoose's request, Morgan testifies that he destroyed the contract he gave Margaret Hoose, and made another contract of the same kind to Maggie Hoose (her daughter). This contract was never acknowledged or recorded, and, it is claimed, was destroyed in the fire. On the same day, July 24, 1888, Margaret Hoose, with the consent of the defendant company, assigned her interest in the policy of insurance to Maggie Hoose. The witness Morgan testifies that there was no time fixed in the contract when the $2,000, with interest, was to be paid him; that Maggie Hoose gave him no notes, and that she could pay it when she got ready, in 20, 30, or 40 years; that no interest had been paid him; and that, in addition to the $2,000 and interest, the property was incumbered by a mortgage given by Margaret Hoose of $1,200; and that after he gave this contract to Maggie, and in November, 1888, he, together with his wife, gave a further mortgage upon the property, with the knowledge and consent of Maggie Hoose, for $300. This money was for the benefit of her brother Alfred Hoose, who was her general agent in the transaction of her business; and Maggie Hoose upon the stand does not deny that she had knowledge and gave consent to the mortgage, but says she does not remember it. It was, however, a disputed question of fact upon the trial of the case whether Maggie Hoose had knowledge or consented to be execution of the mortgage by her brother-in-law, Morgan, for the $300 raised for the benefit of her brother, so that she became obligated to pay the $300, and upon that point the evidence was submitted to the jury by the court in his charge, in which he stated to them as follows:

"Now, there is one other question on which a defense has been made, and it goes to this section of the policy: 'If any change takes place in the title, interest, location, or possession of the property,' then, and in that event,

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'the entire policy, and every part thereof, shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances;'—in such instance, whether after the assignment a mortgage was given for some $300, and the company asserts that that is a change in the title, and the interest of Maggie Hoose, which would avoid the policy. Well, gentlemen of the jury, I think that in the construction of this policy there must be a change in the actual title of Maggie Hoose, and that a mere change—and that the title, by George W. Morgan giving a mortgage—unless the title of Maggie Hoose was affected thereby would not be a breach of that condition of the policy so as to forfeit the benefit which the plaintiff would otherwise be entitled to. I do not think there can be a forfeiture of the policy upon that ground, unless the title of Maggie Hoose has been affected by that three hundred dollar mortgage. The mere fact that George W. Morgan gave a mortgage would not forfeit the policy, unless it was agreed between the parties that it should affect the contract interest of Maggie Hoose. Now, you have heard the testimony upon that point, and I say to you now, if you find that the contract interest of Maggie Hoose was affected, that is, that under the circumstances of the case she became obligated to pay that, by agreement between the parties themselves, then that, gentlemen of the jury, would constitute a forfeiture of this policy; but if it was merely the obligation of George W. Morgan, and if she herself was not obligated in any way there as between George W. Morgan and herself to pay that mortgage which he had put upon the property, why then, gentlemen of the jury, her interest would not be affected, and she would be entitled to recover, unless there is some other breach of the conditions of the policy."

At the time of the fire, George W. Morgan held a policy of insurance on the building, as owner, in the Cooper Insurance Company of $1,000; and Margaret Hoose held a policy in the Pacific Insurance Company, on the furniture, of $1,500; and Maggie Hoose held this policy in the Prescott Insurance Company, on the same building, as owner, of $1,000, and the contents, $2,000.

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The policy sued upon contained near the close of the instrument the following stipulation:

"This policy is made and accepted upon the above express conditions, no part whereof can be waived, except in writing signed by the secretary."

Under the pleadings, the insurance company, upon the trial below, denied appellee's right to recover because she was not the sole and unconditional owner of the property, and she did not own the ground upon which the insured building stood in fee-simple; and also because of false statements in the proofs of loss furnished, as required by the policy; and, further, by the amendment made at the trial, because there had been a change of the policy-holder's interest after the issuing of the policy, without the knowledge and consent of the company, and without having such change indorsed upon the policy.

As to the first point of defense, the plaintiff claims that there is a liability because the defendant, through its agent, had notice at or prior to the issuing of the policy of the true state of the title. This claim is based upon the testimony of Mr. Brasell Hoose, who testified that he told Smalley & Sterling, in May, 1887,—one year before the policy in the suit was written,—who were then the agents of the Prescott Insurance Company, upon the occasion of their being applied to to issue a policy upon the property, of the situation of the title. He says that Smalley and Sterling both looked over the property, the house, stock, and everything, and were perfectly satisfied to take it.

"*Q.* What, if any conversation was had between them and Alfred Hoose, or yourself, or any of the persons there in the family, about the title?

"*A.* I told them that there was a mortgage on the property at the Mechanics' Bank of $1,200. We also told him that there was a deed running to George W. Morgan for $2,000 on the property,—money we had borrowed to

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put in the building,—and then there was a title going back to my wife with that for two thousand more."

It may be stated that Smalley & Sterling, the agents of the Prescott Insurance Company at that time, who issued the policy to Margaret Hoose, was a firm composed Mr. Smalley and Howard W. Sterling; that this firm dissolved shortly after the policy was issued in 1887, and Howard W. Sterling continued for a time further as agent of the defendant, and when the present policy in suit was issued, namely, on May 19, 1888, the agent of the company was Howard W. Sterling, who was formerly one of the members of the firm. It was also a disputed fact upon the trial as to whether or not the agent of the defendant, at the time he insured the property, had been informed of the true state of the title, and at the plaintiff's request a special question was addressed to the jury, and answered by them as follows:

"*Q.* Did H. W. Sterling, the agent of the defendant, know, at the time the policy in this suit was issued, the condition of the title to the real estate on which the building mentioned in said policy stood, and of the mortgage thereon to the Mechanics' Bank of Detroit for the sum of twelve hundred (1,200) dollars?

"*A.* Yes."

The plaintiff insists that, under the facts and circumstances surrounding the making of the contract, and the fact that the agent was cognizant of the real situation of the title, the defense set up by the insurance company that the policy is void because the true state of the title is not indorsed thereon in writing ought not to prevail.

The defendant claims that the provisions of the policy referred to constitute a warranty, and that, if untrue, the policy is void; and the construction it places upon this instrument is that because the real interest of the party insured was not indorsed in writing upon the policy, and because it was not stated that she was *not* the sole and

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unconditional owner of the building, and because it was not stated or indorsed upon the policy that the building stood on ground not owned in fee-simple by the assured, and because it was not indorsed on the policy that the assured was the equitable owner by virtue of a land contract to purchase, and because after the $300 mortgage was given by Morgan, it was not likewise indorsed upon the policy, each and every part of the policy is void, and of no effect.

It is therefore necessary for us to place a construction upon the policy before us. And, in construing warranties contained in policies of insurance, it may be asserted that the prime object to be reached is the intention of the parties, and, if that can be found, such intention must control. The rules in the interpretation of such warranties are the same as those which apply to the interpretation of other mercantile contracts. All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation, and wherever in a policy of insurance there is a clear breach of the warranty contained therein, however immaterial it may be, the policy will be avoided. It may be said that the warranties contained in the policy are somewhat different from representations made, in this: That while a representation may be satisfied with a substantial, or even an equitable, compliance, a warranty requires a strict and literal fulfillment. As it is stated by Mr. Arnould on Marine Insurance:

"Whatever the warranty avers must be literally true, and what it promises must be actually performed."

The reasons for such literal construction appear to be that insurance is granted on the faith of the accuracy of the statements made by the assured, the information concerning which is generally, and often exclusively,

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within the knowledge of the assured; and it is only just to the insurer, when he asks for positive and accurate information, that it should be given him. It is in reliance upon the facts given that the contract of insurance is made, and the purpose of requiring a warranty is to dispense with inquiry, and cast upon the insured the obligation that the facts shall be as he represents them. *Insurance Co. v. Huntzinger*, 98 Penn. St. 41.

But we must look at the situation of the parties, the condition of the thing insured, and what was said or done at the time the insurance was effected, in order to arrive at the intention of the parties, which, as before stated, must control in the construction of the warranties contained in the instrument. If the representations are in writing, that is the evidence of what they are. If no application is made in writing, and no statements contained in any written application for insurance as to the risk and the subject-matter of it, then oral proof of such facts may be introduced. In the case under consideration, there was no written application required or given; the application was verbal, and representations, if any were made, were verbal. We have then here the case of a verbal application, and, under the findings of the jury, a true statement of the condition of the title, made by the assured to the defendant through its agent; and afterwards, with the knowledge of that title, the policy in suit issued, in the form and language sued upon, and delivered to and accepted by the plaintiff, or the plaintiff's assignor. It became a binding contract between the parties only from the time of delivery and acceptance, which occurred at the date of the policy, May 19, 1888.

In view of the claims now set up by the defendant with reference to the terms of the warranties contained in that instrument, it will be necessary to restate a little

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more minutely what it contains. In the first place, in consideration of the premium given, and so far as it affects the real-estate interest, the Prescott Insurance Company, of Boston, Mass.,—

"Insure Mrs. Margaret Hoose to the amount of * * * one thousand dollars on the two-story frame building, occupied as a grocery store and dwelling, situated on the north-west corner of Milwaukee and Beaubien street, Detroit, Mich., * * * against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property."

The policy upon its face does not contain any other or more minute description of the building insured than that above given. It does not state whether Mrs. Hoose is the owner of the property insured, or whether she holds any other interest in it than the fee-simple. It merely insured the specified property for $1,000 against loss or damage sustained by fire, but not exceeding the interest of the assured in the property, without stating what such interest was. That Mrs. Hoose had an insurable interest in the building at that time is not disputed. Now, in the policy, next after the insuring clause, follows what is stated to be "warranty of the assured," as follows:

"The assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company any information material to the risk; and this company shall not be bound under this policy by any act of or statement made to or by any agent, or other person, which is not contained in this policy, or in any written paper above mentioned.

"It is also a part of this warranty that, if this policy shall be continued by renewal, it shall be considered as continued under the original representations; and that

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any change in the risk, not made known to this company at the time it is so continued, shall render this policy void.

"This entire policy, and every part thereof, shall become void unless consent in writing is indorsed by the company hereon in each of the following instances, viz.:

"If the assured is not the sole and unconditional owner of the property; or if any building intended to be insured stands on ground not owned in fee-simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, location, or possession of the property (except in case of succession by reason of the death of the assured), whether by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree; or if the title or possession be now, or hereafter become, involved in litigation; or if this policy be assigned or transferred before a loss."

Now, the first important provision contained in the warranty is that any application or statement connected with procuring this insurance is true, and shall be a part of the policy. This provision makes the oral application and statement, made at the time the policy was applied for to the agent of the defendant, a part of the contract, and the finding of the jury in the case is conclusive upon the defendant that its agent was informed of the condition of the title to the real estate on which the building mentioned in the said policy stood, and of the mortgage thereon. The statement that the assured has not overvalued the property described does not apply to this policy, for it is not a valued policy; and nothing is claimed under the clause that the assured omitted to state to this company any information material to the risk, except as to the condition of the title to the real estate. The further provision is not a warranty, namely:

"This company shall not be bound under this policy by any act of or statement made to or by any agent, or

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other person, which is not contained in this policy, or in any written paper above mentioned."

Nor under the circumstances in which this policy was made and delivered can it have any binding effect at all upon the assured, except as to statements and acts of agents and others after the delivery and acceptance of the policy; and this for the reason that the company is bound by verbal statements made to its agent upon which it issues insurance and receives the pay therefor. And it cannot, in the instrument by which it agrees to insure, repudiate the authority of the agent, or repudiate responsibility for his acts, as such.

But the defendant relies upon the further provision contained under this head to the effect that "this entire policy, and every part thereof, shall become void unless consent in writing is indorsed by the company hereon in each of the following instances," namely:

1. If the assured is not the sole and unconditional owner of the property.
2. If any building intended to be insured stands on ground not owned in fee-simple by the assured.
3. If the interest of the assured in the property, whether as owner or otherwise, is not truly stated in the policy.
4. If any change take place in the title, interest, location, or possession of the property, by sale, transfer, or conveyance, in whole or in part.

In construing this portion of the policy, the whole must be taken together. Now, the object sought to be accomplished by the person applying for insurance was to obtain indemnity against loss by fire of her interest in the building. If the insurance company which made out this policy upon the verbal application to its agent had desired to know what interest it was it was insuring, it should have stated it in that part of the policy pertaining

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to the risk. It was the intention of these parties to issue a valid and binding contract of insurance, valid and binding from the time of acceptance of the same by the assured, not that after it had been accepted by the assured then the assured should apply to the company and obtain its consent in writing indorsed on the policy, stating that the assured was not the sole and unconditional owner of the property, or stating that the building intended to be insured stood on ground not owned in fee-simple by the assured, or stating by indorsement on the policy the interest which the assured had in the property covered by the insurance; and yet the language of this part of the policy is that the entire policy, and every part thereof, shall become void, that is, void in the future, unless such consent in writing is indorsed by the company thereon. To give any reasonable force and effect to this clause of the policy, it can only be held to apply to such changes as arise after the policy has been delivered and accepted, in the ownership of the property, or, if a building stood upon leased ground, the ownership of the building, and it does not apply to an existing state or condition of the property at the time the policy was issued. It looks to the future for protection of the insurer, and not to the present, only in so far as the preceding portion of the policy is violated by a misstatement or concealment of any fact material to the risk. Construing this portion of the policy with the testimony in the case, and with the fact that the company issued the policy to Mrs. Hoose, without stating in the policy what her interest was, but insuring the building against loss by fire to an amount not exceeding the interest of the assured in the property, we think that it must be held that the defendant understood the condition of the title, and intended to insure whatever interest Mrs.

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Hoose had which was insurable, not exceeding the amount named in the poiicy. We do not think that it would carry out the intention of the parties, or be a fair and just construction of this instrument, to hold that when it was issued and accepted by the assured, and the premium paid, it was void from that moment because it did not contain the indorsements required above.

The notice of defense interposed under the plea of the general issue does not rely upon any total failure to furnish proofs of loss as required by the policy, but the tenth clause under such notice sets forth that affidavit was made in support of her claim for loss and damage, and sets up that such affidavit was false, and specifies wherein it was so. The counsel for defendant now contend that there was no testimony introduced below showing that proofs of loss had been furnished, or that the condition of the policy in this respect had been waived, and insist that this should reverse the case. There is no exception in the record upon which this contention can be sustained. There were requests to charge made by defendant, but none of them refer to this point, and there are no assignments of error specifying this as a cause for reversal. It is claimed, however, to be covered by the request made by the defendant asking the court to instruct the jury that, under the law and the evidence in this case, the plaintiff cannot recover. If it was intended by this request to raise the question that the plaintiff could not recover for the reason that no proofs of loss had been furnished, the defect in the evidence should have been pointed out in the request. It is entirely too general to cover a defect of proof at the trial which if it had been mentioned could have been supplied if it had been overlooked. It is claimed by counsel for plaintiff that the point was not raised in the court below. We find no mention of it in the charge,

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and the court seems to have passed specifically upon each breach of the contract relied upon by defendant.

With regard to the change of interest by the mortgage of $300, executed by Morgan, we think the question raised was fully covered by the instructions of the court to the jury in his charge above quoted.

We have examined all the errors assigned; those most relied upon have been mentioned. We find no errors in the others which call for a reversal of the judgment, and it is affirmed.

The other Justices concurred.

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DANIEL DAVIS AND THOMAS RANKIN v. E. S. DAVIS ET AL.

Damages—Loss of profits—Right of exclusive use of patented articles—Evidence.

1. In a suit to recover for milk-cans sold to a creamery company, the defendants sought to recoup damages for loss of profits arising, as claimed, from a breach of the agreement of the vendors to protect the defendants in the *exclusive* use of that kind of can in specified territory. The testimony failed to show that, if other creameries had not used the can in the territory, the residents therein would have furnished cream to defendants in preference to the other creameries in *other* cans, but did show the refusal of a portion of such residents to supply defendants with cream in the kind of cans purchased. And it is held that there was nothing tangible upon which the jury could base an estimate of defendants' loss of profits on account of such competition.
2. Evidence that defendants purchased 800 of the cans, and only used 550, when plaintiffs only contracted to furnish them 600, is held inadmissible, it not being competent to show such excess, and the price paid, for the purpose of laying before

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the jury the amount of money invested by defendants in the cans.

3. The testimony showed that the amount of cream received by defendants, with that furnished to other creameries in the territory referred to, only amounted to one-half the daily capacity of defendants' creamery. And it is held that testimony as to the profits which defendants could have made on each pound of butter made during the season, provided the creamery was run to its *full* capacity, was incompetent, there being no *data* before the jury from which to find such a verdict.

Error to Sanilac. (Beach, J.) Argued December 3, 1890. Decided December 24, 1890.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Elbridge F. Bacon (*William A. Mills,* of counsel), for appellants, contended:

1. Evidence of an oral agreement, made prior to the signing of the contract and notes, that plaintiffs would remove the Port Huron Creamery Company, or cause it to withdraw, from the territory conveyed to defendants, was inadmissible; citing *Adair v. Adair*, 5 Mich. 204; *Savercool v. Farwell*, 17 Id. 308; *Martin v. Hamlin*, 18 Id. 354; *Vanderkarr v. Thompson*, 19 Id. 82; *Cline v. Hubbard*, 31 Id. 237; *Baker v. Morehouse*, 48 Id. 334; *Skeels v. Starrett*, 57 Id. 350; *Walsh v. Martin*, 69 Id. 29.

2. The testimony regarding profits was incompetent, because—

a—It called for the opinions of witnesses, instead of the facts from which the jury could form their own opinion, and it was not a proper matter for expert testimony; citing *Lemon v. Railway Co.*, 59 Mich. 618; *Anderson v. Boom Co.*, 61 Id. 494; Sedg. Dam. 589, 591; *Norman v. Wells*, 17 Wend. 162; *Reed v. McConnell*, 101 N. Y. 270; *Wakeman v. Manfg. Co.*, Id. 217; *Mitchell v. Allison*, 29 Ind. 43; *Bissell v. Wert*, 35 Id. 54; *Whitmore v. Bowman*, 4 Greene, 148.

b—Because the questions were based on unsupported assumptions of fact; citing Lawson, Exp. Ev. 537; *Kempsey v. McGinniss*, 21 Mich. 138; *Hitchcock v. Burgett*, 38 Id. 507; *Van Deusen v. Newcomer*, 40 Id. 119; *People* v. *Hall*, 48 Id. 489; *People v. Millard*, 53 Id. 63.

c—Because the loss of anticipated profit is not the proper

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measure of damages in this case, if defendants are entitled to recover any.

Avery Bros. (*Charles H. McGinley*, of counsel), for defendants, contended:

1. Evidence of the frequent assurances by the plaintiffs that the Port Huron people would be removed from the territory was proper, in connection with proof of plaintiffs' representations that they had no right there; and the question whether such representations induced the note was a material inquiry, and the jury were entitled to have the evidence upon the subject to weigh with the surrounding circumstances; citing *Hyde v. Nelson*, 11 Mich. 353; *Brown v. Blanchard*, 39 Id. 790; *Bedford v. Penny*, 58 Id. 424; *Angell v. Pickard*, 61 Id. 561.
2. In support of the right to recover damages for loss of profits, counsel cited *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, Id. 106; *Leonard v. Beaudry*, 68 Id. 312.

CHAMPLIN, C. J. On January 20, 1887, the defendants entered into an agreement with the plaintiffs by which the plaintiffs were to furnish to the defendants certain creamery supplies on the cars at Chicago, and also to put into operation the machinery, which they furnished to the defendants for a creamery at Minden City, in the State of Michigan, which was to have a capacity for making 1,500 pounds of butter a day. Among the supplies to be furnished were 600 Fairlamb milk-cans, of 5½ gallons each. The defendants were to pay the plaintiffs the sum of $2,065, as follows: $1,065 in cash when the machinery was ready for operation; one note of $500, due on or before April 20, 1888; one note of $500, due on April 20, 1889; and, when the defendants were ready to make butter, the plaintiffs were to convey to them the right to use the Fairlamb patent milk-cans within a radius of 10 miles from Minden City, except when in conflict with other creamery plants established before the date of that agreement.

It appears that the creamery was ready to do business by May 20, 1887, at which date Davis & Rankin, the

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plaintiffs, executed and delivered to the defendants an agreement setting forth that the plaintiffs were the owners of the following valuable patent, to wit, No. 215,-812, secured by letters patent issued by the United States for new and valuable improvements in milk-cans, and thereby granted to defendants the exclusive use of said invention within the said territory of a radius of 10 miles from Minden City, where the same does not conflict with Cass City Creamery or Port Sanilac Creamery, which grant was upon certain conditions mentioned in the agreement, not necessary to mention here. At this time the plaintiffs, through their agent, settled with the defendants, and took their notes, one of which is in suit, and reads as follows:

"MINDEN CITY, STATE OF MICHIGAN, May 20, 1887.

"April 20, 1888, after date, we promise to pay Davis & Rankin or bearer at the Minden City Bank the sum of $500, with interest at seven per cent. from date, without defalcation, for value received in filling contract for creamery goods and territory.

"$500."

This note not being paid at maturity, suit was brought upon it, in which the defendants pleaded the general issue, and gave notice that they would show under said plea that a part of the consideration of the note was the full and exclusive right to use the Fairlamb can within the territory mentioned, with the exception of such territory as was at that time used by the Cass City and Port Sanilac creameries; and that they had not been allowed the use and occupation and enjoyment of the privilege of using the Fairlamb can within that territory, as agreed; and that the territory had been used and occupied and enjoyed almost exclusively by a creamery at Port Huron, which had used and gathered cream within the territory with Fairlamb cans furnished by the plaintiffs, contrary to and in violation of their agreement with

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the defendants. They further gave notice that the plaintiffs expressly agreed and undertook to grant to the defendants the sole right to use the Fairlamb can within the territory granted, and expressly agreed to exclude other persons from using or attempting to use, for the purpose of gathering cream for creameries, the Fairlamb can, which they failed to do; and that, by reason of the plaintiffs' failure to observe and perform the conditions of the said agreement, the defendants had suffered great damage in lying idle, not being able to operate their creamery at its full capacity, and were compelled to run at great loss.

As a further defense, they gave notice that they would show that at the time stated, when the plaintiffs sold the cans to the defendants, together with the territory specified, they had previously sold, conveyed, and granted to a creamery situated at Port Huron, known as the "Port Huron Creamery," the right to use the Fairlamb can within the territory so conveyed to the defendants' creamery at Minden City, and notwithstanding they had so sold the same and given the right to the said Port Huron Creamery to gather cream in the Fairlamb can from the territory, the plaintiffs, through their agents and representatives, conveyed the right to use the can in said territory to the defendants, fraudulently, and for the purpose of defrauding the defendants, representing, at the time they so sold the cans and territory to the defendants, that the Port Huron Creamery had no right or interest in the territory conveyed to the defendants, and that the plaintiffs would immediately remove them from the said territory; that the defendants were induced to give the note sued upon on account of the representations made by the plaintiffs at the time as to the right and interest in said territory, and the right to use the Fairlamb can therein, of the Port Huron Creamery,

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all of which representations were false, and known to be so by the plaintiffs at the time they were made, and were so made for the sole purpose of defrauding defendants, and inducing them to execute the note sued on; and that, by reason of the false representations, they suffered damage.

The trial in the case resulted in a judgment and verdict for the defendants over and above the claim of the plaintiffs sued upon of $1,484.24, and the plaintiffs bring the case here by writ of error.

As to the first defense set up, that there was an agreement to exclude the Port Huron Creamery from the territory named, it could not be made available to the defendants, for the reason that it was not embraced in the writings made between the parties. The court below took that view of the case, and charged the jury that the plaintiffs' right of recovery depended upon the question whether they made false representations to induce the defendants to enter into the contract and give the notes in suit, and the damages which resulted, if any, to the defendants by reason of such false representations.

The claim of the defendants made upon the trial was that their damage consisted in a loss of profits which they could and would have made if they had been permitted the sole and exclusive use of the Fairlamb can in the territory designated. The Fairlamb can is not the only can in which cream is collected from among farmers, as appears by the testimony in the case, for mention is made of the Cooley can, and of the Haney can, and it appears from the testimony that the Port Huron Creamery Company had, in its use, in the territory described as the Minden City Creamery territory, 500 of the Fairlamb cans, and 125 other cans; or, in other words, 20 per cent. of the cans used by them in collecting cream from the farmers were other than the Fairlamb cans. These cans

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were owned by different creameries, and were furnished to the farmers in the territory in which the creamery operated, to deposit their cream, and the cans were then collected by the owners of the creamery, and taken to the place of manufacture by them. During the year 1887, the year for which this judgment was obtained, no charge was made to the farmers for the use of the cans. I mention this simply as bearing upon the question as to the damages which might arise to the defendants from not being permitted the exclusive use of the Fairlamb can.

It appears also in the testimony that, in this same district of territory, there was other competition; that the creamery at Bad Axe occupied the same territory, or a portion of it; and that there was a cheese factory in Sherman, running all the time, presumably using a different can from the Fairlamb can.

The defendants introduced some testimony tending to prove that after they started their business they made efforts to get the patronage of the farming community in four towns named, which they say were operated in also by the Port Huron people; that they got some customers, but did not get as large a proportion as they thought they ought to have had, and they place the cause of their failure to get the patronage of those people at the occupation of the same territory by the Port Huron Creamery, and their use of the Fairlamb can. Defendant Davis says he talked with the farmers, and endeavored to induce them to furnish the cream to him, but the objections which they made were that they had already agreed with the Port Huron people to furnish the cream to them; and that they should continue to do so for that year at least; and that they thought that the competition of the Port Huron people was beneficial to them. But nowhere does he state in his testimony that these farmers alleged or claimed that they would not supply their cream to the

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Port Huron people unless they could do it in a Fairlamb can. As before stated, 20 per cent. of them were supplying the Port Huron people with a different can than the Fairlamb.

The defendant Davis testifies that the Minden City Creamery, manufactured, on an average, during the season of 1887, 300 pounds of butter daily. He also testified that their creamery had a capacity of 1,200 pounds as constructed, and they were occupied only about one-half of the time during the year in making butter; that they did not earn their expenses; that the reason was that they could not get their cream, and the reason of not getting the cream, he always claimed, was because the territory was occupied by the Port Huron people. He also testified that his creamery paid 13, 14, 15, and 17 cents per pound for cream, and he says they paid below the market price; that it cost them between 2 and 3 cents to make a pound of butter in their creamery, about 2½ cents to market it, and about 3 cents for gathering it. It further appeared in the testimony that 15 cents a pound for cream was a fair average that year of the cost, and that the price of butter averaged 22 cents a pound. It will be seen that they must have manufactured at a loss. They also introduced testimony by the witness McNutt, tending to prove that the Port Huron Creamery took from the territory covered by the Minden City Creamery a daily average of 275 to 300 pounds of cream; and Mr. Davis, the defendant, testifies that, if their creamery had received that quantity of cream which was taken by the Port Huron people, they could have manufactured at a profit of from one to two cents a pound on the entire amount they manufactured. McNutt also is of the opinion that the Minden City Creamery could have manufactured, if they had received the cream

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which the Port Huron Creamery had taken from that territory, at a profit.

The testimony with reference to the profits which might have been made if the Port Huron people had not used the Fairlamb can was all taken against the plaintiffs' objection, and we think that the testimony was too uncertain and speculative in character to furnish any reliable *data* upon which to estimate profits. There was no testimony showing that, if this can had not been used, the people in this territory would have supplied their cream to the Minden City Creamery in preference to the Bad Axe or to the Port Huron Creamery in other cans, and there appears to be no way of ascertaining such fact. The defendant Davis testifies that he had 800 cans of the Fairlamb patent; that he tried his best to induce the farmers to supply him with cream in these cans, but he failed to do so except to a limited extent. It is fair to presume that the farmers would sell their cream to those who would pay the highest price. There was nothing obligatory upon them to sell their cream to the Minden City Creamery. It differs in this respect from any case which has yet come before this Court in which we have held that prospective profits might be recovered. Mr. Davis went upon the stand, and was asked these questions:

"*Q.* Do you say that the Port Huron Creamery, if it had not been there, you could have got the cream from those parties?

"*A.* I could not swear positively they would give me the cream.

"*Q.* Did you ask them if they would give you the cream if the Port Huron Creamery was not there?

"*A.* I asked them if they would, and they said they would sell to the Port Huron Company another year. They commenced before we did, and they didn't want to change. That is the reason they gave for it.

"*Q.* What were the other reasons they gave?

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"*A.* They gave the reason that they had competition, and if they didn't the price of cream would be too low, and they would not get as much for it.

"*Q.* That is the reason that they would not give you the cream,—because it would keep competition away?

"*A.* Yes, sir; quite a number of them said that."

He further testified in that connection:

"I know, as a matter of fact, that some of the cream collected by the Port Huron Company was not collected in Fairlamb cans. They had some other cans mixed in the territory."

Now, it seems to me that there is nothing tangible upon which a jury can base an estimate of a loss of profits on account of competition in that territory with a Fairlamb can used by the Port Huron Company.

But there are other objections which would make it necessary to reverse this case, even if they could supply a reasonable *data* upon which to estimate the damages. As before stated, it already appears that the quantity of cream collected by the Minden City Creamery Company was an average of about 300 pounds a day, and that collected by the Port Huron Creamery of about 275 or 300 pounds a day, making a total average combined of about 600 pounds. This, according to the testimony, was only one-half the capacity of the creamery of the Minden City Company, so that, if they had all the cream which was collected in the Fairlamb cans in that territory, the total quantity received by them would be a daily average of 600 pounds. Now, in putting the question as to the amount of profits which they were entitled to receive on account of the competition of the Fairlamb can used by the Port Huron Company, these questions were put and answered against the objection of the plaintiffs. The witness McNutt, being upon the stand, was asked:

"*Q.* Now, from your experience in the creamery business, in its economical management, managed in a busi-

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ness-like way, and run to its full capacity, what, from May 20, 1887, to May 20, 1888, would be the cost of manufacturing a pound of butter from a guage of cream; that is, of the territory you are in, from the cream you can gather with the horses, confining it then to the territory, running during the creamery season from 1887 to 1888, and letting the territory be the territory that you occupied at Minden City? What would it be,—what would be the profit?

"*A.* I should judge in that territory that our profit was three cents a pound."

He was then asked whether or not in his opinion, and from his knowledge of the business, and carrying it on, it would cost more to manufacture at Minden City than Port Huron; and he replied:

"They could manufacture it cheaper than we could at Port Huron, because we paid the freight from Minden City to Port Huron on the cream.

"*Q.* Then, what ought to be the profit on each pound of butter manufactured or each guage of cream collected to the Minden City Creamery, provided that it ran to its full capacity, and ran economically? What would you say it ought to be?

"*A.* I think if it were run to its full capacity, with expenses that would naturally be connected with it during the year 1887, they should clear four cents a pound on their butter, provided they ran it with full capacity, with the expenses that would necessarily be at a creamery."

There was no *data* whatever introduced before the jury upon which they would have been authorized to find a verdict based upon the profits which the Minden City Creamery could have received if it had run at its full capacity. The testimony is uncontradicted that all the cream they received, and including that which they say was taken away in the Fairlamb cans for Port Huron, did not exceed 600 pounds on a daily average, which would be only, as before stated, one-half of the capacity of the creamery. This testimony must have had a prej-

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udicial influence with the jury, for Mr. McNutt testified that the capacity of the Port Huron Creamery was 800 pounds daily average, and that they realized from that season's business a profit of only one cent a pound, or about $1,600 for the season's work; whereas, in this case, if the capacity be called 600 pounds daily average, the jury have found a verdict which would make the profits exceed $2,000.

Another error was committed in permitting the defendant Davis to testifiy that he purchased 800 of the Fairlamb cans, and that he had used only 550. The contract only called upon the plaintiffs to supply 600 of these cans, and, if the defendants purchased more, it was not competent for them to show the excess, and the price of them, for the purpose of laying before the jury the amount of money which they had invested in cans.

We do not deem it necessary to pass upon the question of the fraud alleged in the declaration and exhibited through the proofs, as we are of opinion that the measure of damages relied upon in the case, as being on account of a loss of profits in the use of the Fairlamb can, is not a proper measure of damages for such misrepresentations, if any were made, not, however, deciding that if they could be connected, and made out to a reasonable certainty, it might not be a proper method of arriving at the damages.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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BERTHA E. ELY ET AL. v. THE CITY OF GRAND RAPIDS.

Municipal corporations—Public improvements—Contract—Letting to lowest bidder—Change in plans.

Section 15, tit. 6, of the charter of the city of Grand Rapids, which provides that the plans and specifications of the work, for the payment of which an assessment is ordered to be made, may be *changed*, and the work added to or diminished, at any time before the completion of the assessment roll therefor, does not refer to the contract for the work which, under the charter, must be awarded to the lowest bidder; and the changes covered by section 15, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. *McBrian v. City of Grand Rapids*, 56 Mich. 95.

Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued December 5, 1890. Decided December 24, 1890.

Bill to restrain the collection of a special assessment for street improvement purposes. Complainants appeal from a decree dismissing their bill. Reversed, and decree entered in this Court as prayed. The facts are stated in the opinion.

Eggleston & McBride, for complainants.

J. W. Ransom (*W. W. Taylor*, of counsel), for defendant.

[Briefs of counsel are confined to a discussion of the propositions stated in the opinion, no authorities being cited.—REPORTER.]

GRANT, J. The charter of the city of Grand Rapids contains the following provisions:

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1. "When the common council of said city decide that the construction of any public work in said city is a necessary public improvement, the board of public works shall determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work, and of the material to be used, in detail, and cause to be prepared, so far as necessary, plans and specifications for such work, and report their estimate to the common council as a basis for assessing, or otherwise raising, according to law, the funds necessary to enable the board to go forward and complete such work."

2. "The work shall be done under the direction and supervision of the board of public works, and upon contracts and under plans and specifications to be prepared by the city surveyor, and approved by such board."

3. "The board of public works shall advertise for proposals to execute the work, and for materials, according to plans and specifications adopted by the board, and may contract with the lowest bidder."

On June 20, 1887, the common council adopted a resolution requesting the board of public works to establish the grade line of Curtis street, and furnish the council with an estimate of the cost of grading, graveling, and paving the gutters of the same, the same being a necessary public improvement. All the subsequent proceedings, including the petition by the property-owners, the estimate, the letting of the contract, and the first assessment to cover the expense, are admitted to have been regular. The estimate submitted to the council by the board of public works was $2,920. Upon this report, an assessment was made by the council, which was satisfactory to the parties interested. Of the bids made the lowest was $2,792, and for that sum the contract was let. In the estimate upon which these bids were made was the item: "Stone paving, 159 square yards." There was no item for "paving gutters," either in the estimate, specifications, or contract, and after the work had progressed somewhat

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it was discovered that, while the improvement provided for in the original resolution contemplated and required the gutters to be paved, no provision was made therefor in the contract and specifications annexed thereto. Upon making this discovery, the board instructed the engineer to see the contractor, and obtain from him a proposition to pave the gutters. He offered to do it for the same price per yard for which he had contracted to do the 159 square yards of paving. The engineer reported this to the board, with his estimate of the number of yards of paving, making it 2,135 yards instead of 159 yards, as in the original contract. This would leave 1,976 square yards of gutter paving, which, at 40 cents per yard, amounts to $790.40. This was approved by the board, and certified to the council. The council thereupon rescinded its former resolution and order providing for the assessment, set aside the assessment roll, and adopted a new resolution and order for assessment, increasing the assessment from $2,920 to $3,970. This new contract was not open to competitive bids. The defendant was proceeding to collect these assessments by sale of the complainants' lands when they filed the bill in this cause to enjoin the sale. Upon the hearing the bill was dismissed.

The sole question in the case is, was the action of the board of public works in letting the contract for the pavement of the gutters without advertising for bids legal? The action is defended upon the ground that it was extra work, within the meaning of the original contract and the charter. The contract reserved to the defendant "the right to change any portion of the work from time to time, and to make all necessary additions thereto or deductions therefrom." Section 15, tit. 6, of the charter provides that the plans and specifications of the work, for the payment of which an assessment is

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ordered to be made, may be changed, and the work may be added to or diminished, at any time before the completion of the assessment roll therefor, but not afterwards; and, if it shall appear that a greater sum of money has been expended in the completion of such improvement than was estimated, the common council may direct the assessment of the same on the owners and occupants of houses and lands benefitted by the improvements. This section does not refer to the contract for the work which, under the charter provision above given, must be awarded to the lowest bidder. The estimate and not the contract is made the basis for the assessment. If the work costs less than the estimate and the amount assessed, the charter provides the distribution of the balance among the property-owners who were assessed. If it costs more, a new assessment may be made. It is true that the paving of the gutters was within the scope of the improvement, but this did not confer upon the defendant the right to dispense with the charter requirement for competitive bids. The whole improvement required a certain number of cubic yards of excavation and embankment, also road gravel, screened gravel, top dressing, and a certain number of thousand feet of timber, and these were stated in the estimates. If the contract had been for making the excavations, which included only about one-third of the cost in the original contract, would it be contended that the defendant could let private contracts for the balance of the work upon the theory that it was within the scope of the improvement? The result would be a practical annulment of the provision for competitive bids. Under this theory a contract to grade might be extended into a contract to pave; a contract to pave with stone into a contract to pave with wood or asphalt at a greatly increased cost; a contract for any

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distinct part of a public improvement into one for the whole. In *Brevoort v. Detroit*, 24 Mich. 322, the bid and contract were for paving about one-half the distance, or "farther, if ordered." It was held that the whole work was covered by the original bid, although the council ordered the balance of the work to be done. The changes covered by the above section of the charter, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. They cannot include distinct work not therein mentioned nor contracted for. It is of no consequence that a part of the public improvement is omitted from the estimate and contract by mistake. The result is the same as if it were intentionally done. This work of paving the gutters was entirely outside the contract. The private contract for the performance of the same was without authority and void. *McBrian v. City of Grand Rapids*, 56 Mich. 95. It is proper to add that there is no evidence of bad faith or improper motives on the part of the city authorities and the contractor.

The decree of the court below must be reversed, with the costs of both courts, and a decree entered here restraining the collection of the amount so held to be illegally assessed.

The other Justices concurred.

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ISAAC M. WESTON v. STEPHEN L. MONROE ET AL.

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Taxes—Records of board of supervisors—Omission of signature of chairman—Alteration of roll.

1. The failure of the chairman of the board of supervisors to sign the record of the proceedings of the board in equalizing the assessments and apportioning the State tax is fatal to the validity of a tax deed based thereon.
2. How. Stat. § 501, requiring that every order, resolution, and determination of a board of supervisors shall be recorded in the records of such board, and signed by the chairman and clerk of the board, includes all the proceedings required by law to be entered upon the records of the board. *Pearsall v. Board of Supervisors*, 71 Mich. 488.
3. Public policy will not permit any tampering with an assessment roll after it is equalized and completed and certified as required by law.

   So *held*, where after the equalization of his assessment roll, and at the time of extending the taxes thereon, the supervisor added a number of descriptions of land to the roll, and increased the valuation of one description from $80 to $800, the addition amounting to about $3,500, which action is held fatal to the validity of the tax roll.

Error to Kent. (Grove, J.) Argued December 4, 1890. Decided December 24, 1890.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

William D. Fuller (*Willard Kingsley* and *John E. More*, of counsel), for appellant.

FitzGerald & Barry (*M. Brown* and *Francis A. Stace*, of counsel), for defendants, contended for the doctrine stated in the opinion, citing the authorities therein cited.

GRANT, J. This is an action of ejectment. Judgment

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was rendered in the court below for defendants, and plaintiff appeals.

Plaintiff claimed title under a tax deed based upon the sale of the land for the State tax of 1873, all other taxes having been paid. Defendant Monroe held the original government title to the land, and the other defendants were in possession under him. Plaintiff's title rests upon the validity of his tax deed. Various objections are raised to its validity, two of which are fatal, rendering a discussion and determination of the other objections unnecessary.

1. The proceedings of the board of supervisors in apportioning the State tax, and equalizing the assessments, was not signed by the chairman of the board. How. Stat. § 501, is as follows:

"Every order, resolution, and determination of such board of supervisors, made in pursuance of this act, shall be recorded in the records of such board, and signed by the chairman and clerk of such board."

We think the above section includes all the proceedings required by law to be entered upon the records of the board. This being so, the case at bar is ruled by *Pearsall v. Board of Supervisors*, 71 Mich. 438. See, also, *Sibley v. Smith*, 2 Mich. 486. The above section was enacted in 1851. The case of *Lacey v. Davis*, 4 Mich. 140, involved proceedings had in 1842 and 1844, when no such statute was in force, and the decision was based upon the fact that the record there involved was not required to be signed by any one. The raising of taxes is among the most important powers conferred upon the board, and the reasons stated in the Pearsall case, by Mr. Justice CHAMPLIN, apply with equal force to the case at bar.

2. After the supervisor had completed and certified to his roll, had submitted it to the board of supervisors, and

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had received it back from the board with the certificate of the chairman affixed thereto, the supervisor, without any authority from the board, made several substantial alterations in the roll, by adding a number of parcels of property thereto, and increasing the assessment of one parcel from $80 to $800. The additions thus made amounted to about $3,500. This is admitted, but it is insisted that the defendants cannot attack the validity of the assessment because they are not injured thereby. This case is ruled by *Ferton v. Feller*, 33 Mich. 199, where the unauthorized change made by the assessor was to the advantage of the tax-payer. The supervisor's authority over the roll had ended, so far as making any changes was concerned. Public policy will not permit any tampering with the roll after it has been completed and certified to, notwithstanding the intention be good, and the tax-payer not injured. The reasons for this are very ably and forcibly stated by Mr. Justice CHRISTIANCY, in *Clark v. Axford*, 5 Mich. 182, and by Mr. Justice GRAVES, in *Ferton v. Feller*. If the supervisor may make one material change, he may make them *ad libitum*. The evils of such a course are apparent. The door to them must be kept closed. The roll thus changed is not the tax roll authorized by law. Its legal identity is destroyed.

Judgment affirmed, with costs.

MORSE, CAHILL, and LONG, JJ., concurred. CHAMPLIN, C. J., did not sit.

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GUSTAVE A. WOLF v. WILLIAM W. IRWIN.

Principal and agent—Appeal—Conclusiveness of finding of jury.

The issue involved in this case was whether the defendant, in contracting for the printing of a record, bound himself or his client. And it is held that the finding of the jury of this disputed question of fact against the defendant is conclusive.

Error to Kent. (Grove, J.) Submitted on briefs December 5, 1890. Decided December 24, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

A. D. Hawley, for appellant.

M. H. Walker, for plaintiff.

GRANT, J. This suit originated in justice's court, and involves the sum of $14.35, being the cost of printing the record in the case of *Tate v. Hamilton,* 81 Mich. 221. Plaintiff recovered judgment in justice's court. Defendant appealed to the circuit court, where verdict and judgment were again rendered for plaintiff, and defendant appeals. The costs now amount to many times the value of the judgment.

The record was printed by one Neinhardt, at the agreed price of 35 cents per page. The agreement was made between Neinhardt and the defendant, who was the attorney for Tate in his appeal to this Court. Neinhardt assigned the claim to the plaintiff. The record in this case consists of 112 pages, the briefs for the appellant 32 pages, and the brief for the plaintiff 21 pages.

The principal question in the case, and the one upon which defendant's liability hinges, is whether the defend-

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ant in the agreement with Neinhardt bound himself or his client. It would be of no value to the profession or to the public to enter into the details of the evidence upon this question. It is sufficient to say that the evidence upon the part of the plaintiff tended to show that Neinhardt did not know Tate; that he dealt solely with the defendant; that he gave credit to the defendant; and that the contract was made with him as principal, and not as the agent of Tate. The evidence on the part of the defendant tended to show that he informed Neinhardt that the work was for Tate, and that he made the contract as his agent. A clear and concise issue of fact was presented for the determination of the jury. The court instructed the jury that the controversy was whether Mr. Irwin contracted with Mr. Neinhardt upon his own responsibility, rendering himself personally liable, or whether he contracted as the agent of his client, rendering his client liable for the work. All the instructions to the jury given by the circuit judge were based upon this proposition, and were correctly given. They were such as are familiar to the profession, and it would be profitless to repeat them here. It is unnecessary to consider any of the specific errors alleged. The jury found the disputed question of fact as to the defendant's liability against him, and this is conclusive.

Judgment is affirmed, with costs.

The other Justices concurred.

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ROXA T. PALDI v. ANGELINE PALDI.

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Adverse possession—Ejectment—Claim for improvements—Taxes—Validity of roll.

1. The presumption that the continued occupancy of land by a grantor after its conveyance and the recording of the deed is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of the grantee (*Bloomer v. Henderson*, 8 Mich. 405; *Dawson v. Bank*, 15 Id. 489; *Humphrey v. Hurd*, 29 Id. 44; *Jeffery v. Hursh*, 45 Id. 59), can only be overthrown by circumstances tending to show a clear renunciation of such tenancy, brought home to the grantee, and of a subsequent exclusive, adverse possession by the grantor under a claim of superior right.
2. A supervisor authorized a neighbor to copy the roll of the previous year so far as the real estate was concerned, making only such changes as were necessary by change of owners, and to attach and sign the statutory certificate; which action is held not to be in accordance with the law, which requires the exercise of the best judgment of the supervisor in assessing property at its cash value.
3. A supervisor's certificate of assessment under How. Stat. § 1025, in which the words "*fixed* or auction sale" are used instead of "*forced* or auction sale," is fatally defective.
4. The record of equalization set forth in the opinion is held to be too uncertain to have any value as a public record.
5. Where a grantor remains in possession of the granted premises in subordination to the rights of the grantee, and during such occupancy buys in an outstanding tax title, the recording of the tax deed is not, standing alone, such an assertion of an independent, hostile title as will entitle the grantor to recover for improvements made after securing such tax deed, but a claim of an adverse holding thereunder must have been expressly asserted and brought home to the grantee.

Error to St. Clair. (Canfield, J.) Argued December 2 and 3, 1890. Decided December 24, 1890.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

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Frank Whipple, for appellant, contended:

1. Mrs. Paldi made no deed. A wife, joining in a conveyance with her husband, conveys her dower interest alone; citing *Hovey v. Smith*, 22 Mich. 172; *Kitchell v. Mudgett*, 37 Id. 85; *Carley v. Fox*, 38 Id. 389; nor can she become liable on an executory promise except concerning her separate estate; citing *De Vries v. Conklin*, 22 Mich. 255; *Emery v. Lord*, 26 Id. 431; *West v. Laraway*, 28 Id. 464; *Ross v. Walker*, 31 Id. 120.
2. Possession by a grantor after his conveyance may be so continued as to raise a presumption of rights retained or since acquired in the land; citing *Bennett v. Robinson*, 27 Mich. 26; *Jeffery v. Hursh*, 45 Id. 59; and the facts bring Justin L. Paldi clearly within the rule laid down in *Bower v. Earl*, 18 Mich. 367; *McCall v. Wells*, 55 Id. 171; *Youngs v. Cunningham*, 57 Id. 153; *Cook v. Clinton*, 64 Id. 309; *Greene v. Anglemire*, 77 Id. 168.

Albert McCall and *Avery Bros.*, for plaintiff, contended for the doctrine stated in the opinion.

CAHILL, J. This is an action of ejectment commenced December 21, 1887, in the circuit court for the county of St. Clair, to recover the S. E. ¼ of section 32, township 8 N., range 14 E., in that county. The plaintiff shows the following title:

1. Certified copy of a patent from United States to Ange Paldi, dated March 3, 1854.
2. The record of a deed from Angelo Paldi and Marie Ann H. Paldi to Justin L. Paldi, dated April 30, 1872, recorded July 25, 1872.
3. The record of a deed from Justin L. Paldi to the plaintiff, dated November 18, 1879, recorded November 21, 1879.

The plaintiff also put in evidence tending to show that Ange Paldi, to whom the patent was issued, was the same person who, with his wife, executed the deed to Justin L. Paldi, April 30, 1872, under the name of Angelo Paldi; that he was an Italian by birth; that his real name was Angelo, but that he was sometimes known and called by the name of "Ange." It was also shown that after obtain-

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ing his patent he went into actual possession of the land, and resided on it with his family for some years. Justin L. Paldi is a son of Angelo Paldi, and the plaintiff is the wife of Justin L. Defendant is a daughter of Angelo Paldi, and a sister of Justin L. The defendant claims title—

1. Under a tax deed made by the Auditor General for the taxes of 1873 to Frank A. Dean.
2. By a quitclaim deed from Frank A. Dean to Marie Ann H. Paldi.
3. By adverse possession held by this Marie Ann H. Paldi in her life-time, and by defendant since her death.
4. By will of Marie Ann H. Paldi, by which the land was devised to defendant.

On the trial in the circuit, the circuit judge directed a verdict for the plaintiff, upon the ground that the plaintiff, having shown a clear title, was entitled to recover, unless such *prima facie* title was overthrown by the defendant; and that the defendant had failed to defeat plaintiff's title—

1. Because the tax title was invalid.
2. Because there was no evidence of such an exclusive and adverse occupation for the length of time required by the statute as to form a basis of title by prescription.

In this we think the circuit judge was right. The facts upon which defendant bases her title by adverse possession are as follows: For some years prior to 1872, Angelo Paldi, who located the land, resided with his family upon it. In that year, for reasons which are not explained, and which are unimportant to this inquiry, he left his family and went to live in the state of New York, where it is claimed he afterwards procured a divorce from his wife, and remarried. Before going away he made a deed of this land to his son Justin L. Paldi, in which his wife joined. After executing this deed, the wife, who was the mother of the grantee named in it,

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still remained with her family upon the farm, and continued to live there until her death, in 1886. During a part of the same time, commencing in July, 1872, Justin L. Paldi resided with his family in the same house with his mother and her family. The circumstances under which he resided there are in dispute. He claims that he was there as owner, operating and running the farm. Defendant claims that he was a mere boarder. It is not important to determine this question. There is nothing in the evidence to show that, during the first few years after she joined with her husband in the deed to Justin L., Mrs. Paldi claimed to occupy the land in any other way than as in subordination to her grantee. It was reasonable and natural that she should be allowed by her son, after the desertion of her husband, to remain in possession of the old homestead. It is true that defendant herself testifies that her mother always claimed to own the farm from the time her husband left until her death, and that since that time defendant claimed to own it; but it nowhere appears that this claim was made to Justin, or that he knew that his mother, after joining in the deed of the farm to him, was claiming to hold in opposition thereto. The defendant testified as follows.

"*Q.* Who worked the farm from your father's leaving to your mother's death?

"*A.* Well, mother and I, generally. I was the head, you know; only when Justin came there, he wanted to run things to suit himself, but still we took it in our hands to suit ourselves.

"*Q.* What occupancy has Justin had of the farm since your father went away?

"*A.* I don't know as he ever had any, with the exception of once in a while. He never had any occupancy of the farm."

The defendant, Angeline, was herself one of the witnesses to the deed from Angelo and wife to Justin L. She and her mother must be presumed, therefore, to have

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known just what rights Justin claimed in the property, and yet she does not testify that any question was made to Justin about this deed, or of his rights under it, until some years afterwards. It was said by this Court in *Bloomer v. Henderson*, 8 Mich. 405, that—

"If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world: 'Whatever right I have, or may have claimed to have, in this land, I have conveyed to my grantee, and though I am yet in possession it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.'"

This doctrine was approved in *Dawson v. Bank*, 15 Mich. 489; *Humphrey v. Hurd*, 29 Id. 44; and *Jeffery v. Hursh*, 45 Id. 59. This presumption could only be overthrown by circumstances tending to show a clear renunciation of the rights of the grantor, brought home to the knowledge of the grantee, and of a subsequent exclusive, adverse possession under claim of superior right.

There is no evidence in the record that the right of the grantee, Justin L. Paldi, under his deed, was at any time questioned by his mother, at least during the year and over that he lived with her on the farm in 1872 and 1873. There is evidence tending to show that in 1879 she accepted a life-lease from the plaintiff. It appears also that, in 1882, the defendant, together with all of her brothers, except Justin L., filed a bill in the St. Clair circuit, in chancery, against Justin L. Paldi and the present plaintiff, setting out that the deed, under which they claim title from Angelo Paldi and wife, was a forgery; that Angelo Paldi continued to be the owner of the land up to and including the date of his death, in the year 1878; that the greater portion of said land was unimproved, and in a wild state, but the whole thereof was and is known as the "Paldi Homestead;" and that the first two

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descriptions (being the E. ½ of the N. E. ¼ of section 32, and the W. ½ of the N. W. ¼ of section 33) have been, since the death of Angelo Paldi, in the possession of his widow and daughter, Angeline Paldi. But there was no allegation in the bill that the widow of Angelo Paldi or the present defendant was in the possession of the land in question in this suit. The bill alleged that their father was dead, and that complainants claimed this and other lands as his heirs at law, subject to the right of dower of Marie Ann H. Paldi as his widow. Justin L. and Roxa F. Paldi filed their several answers to this bill, denying that the deed was a forgery, claiming that it was executed, acknowledged, and delivered for the consideration named therein of $5,000; that under it defendant Justin L. took possession of the entire of said premises on or about July 12, 1872, and has ever since lived thereon with his wife, Roxa. It is conceded that the proceedings so commenced by bill were discontinued in September, 1883, but for what reason does not appear.

Marie Ann H. Paldi, at her death, left a will devising all her estate to defendant, Angeline, who was named executrix. This will was admitted to probate. The defendant, as executrix, filed an inventory of the property that had come into her possession, in which she included the land in question under the following description: "S. E. ¼ of sec. 32, T. 8, R. 14 E., *a tax title*, $200.14." The filing of the bill by defendant, and the return of the inventory of her mother's estate, is relied on by plaintiff as evidence tending to show that the defendant has not always regarded the land as belonging to her mother. We think the testimony tended legitimately to disprove her claim in this case that after her father left, in 1872, her mother claimed to own the land.

The tax deed under which defendant claimed was held to be invalid, but upon what ground the record does not

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disclose. The tax deed was invalid for the following reasons:

1. There was no valid assessment made by the supervisor, the assessment roll having been made out and certified to by a neighbor, as appears by the testimony of the supervisor, and the neighbor who made the roll, as follows: John D. Jones was sworn for the plaintiff, and testified that he was supervisor of Brockway township in 1873, and produced the assessment roll of that town for that year.

"*Q.* Mr. Jones, will you state to the court and jury who made that assessment roll?

"*A.* I made a part of it, and John S. Duffie made a part of it at my request. Let me tell you how that happened: I had a drive over on Cass river, and I was elected supervisor, and I had to go and attend to my drive. I had some twenty-eight million feet of logs over there, and I went over there next day after election to drive my drive of logs from Saginaw, and the consequence was I didn't get back again until the Saturday before the review. The review comes on the third Tuesday after the third Monday. I think it was Tuesday. Now, I went to Mr. Duffie as quick as I got home, and I supposed they had appointed another supervisor, but I found they hadn't, so I went to Mr. Duffie and asked him if he wouldn't take my year before roll and the roll that I had for that year and copy from the last-year roll all the names, and, as far as it was right, to carry them out, the value the same as they were on the old roll, not to change any of them, and I would go round and take up the deaths and births and the personal property. * * *

"*Q.* Look at the certificate and see whose handwriting it is.

"*A.* I think it is Mr. Duffie's. I told him to do it.

"*Q.* Whose handwriting is the signature?

"*A.* That is Mr. Duffie's. I authorized him to do it for me, so as to get the rolls ready for the review."

John S. Duffie testified that in 1873 he resided in the township of Brockway, and knew John D. Jones, supervisor.

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"*Q.* Will you state how that assessment roll was made for the year 1873.

"*A.* Mr. Jones was on a drive of logs on the Cass river, and he requested me to take the assessment roll for that town for 1872 and copy that, except such changes as I knew had taken place in the ownership of land, and where I knew there was no change to keep the same personal property. We took the names from the old roll, leaving the value of real estate the same, and, where the changes took place in personalty, that was left out for Mr. Jones to fix, and the whole roll was copied in that way. He told me to go on and copy the whole of it, and prepare it for the review. I copied the names, descriptions, number of acres, value of real estate, and the greater part of the personal property. I attached this certificate to it so as to have it ready for Mr. Jones. I made it out and signed it."

This is not what the law requires of a supervisor, charged with assessing property at its true cash value. The performance of this duty requires of him the exercise of his own best judgment. As was said in *Woodman v. Auditor General*, 52 Mich. 30:

"The listing of property [in an assessment roll] is clerical, but the ascertaining and determining its value is judicial, requiring the judgment of the supervisor under his oath of office, and cannot be dispensed with in making a valid assessment roll."

In this case the supervisor authorized Mr. Duffie to copy the roll of the previous year so far as the real estate was concerned, making only such changes as were necessary by change of owners, and to make out and sign his certificate. These are duties which cannot be delegated by the supervisor, but must be performed by him personally.

2. The supervisor's certificate is not sufficient under How. Stat. § 1025, and the numerous decisions of this Court. In that part of the certificate in which he stated that he had estimated the same at what he believed to

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be the true cash value thereof, and not at the price it would sell for at a forced or auction sale, the certificate used the words "*fixed* or auction sale." This may have been a clerical error, but great strictness has been insisted upon in all cases where the certificate of the supervisor has been under consideration. The form of it was amended from time to time by the Legislature with the view to preventing the almost universal tendency to undervalue property by the supervisors in the interest of their own localities as against others. We cannot say that the word "fixed" was intended by the supervisor to have the same meaning as the word "forced" used in the statute. *Silsbee v. Stockle*, 44 Mich. 566; *Fuller v. Hannahs*, Id. 578. In the latter case, the only thing omitted from the certificate were the words "as aforesaid" in that part of the certificate which stated, with reference to the personal property, "that I have estimated the same at the true cash value *as aforesaid* according to my best information and belief."

3. There was not such an equalization of the rolls as the statute requires. The tax law in force when the taxes of 1873 were levied, required the supervisors to equalize the valuations of the real estate in the several townships and wards, pointed out the steps to be taken to that end, and required a record to be kept of the action taken. As has been frequently pointed out, this is an important step in tax proceedings. Upon it depends the amount of the State and county taxes that shall be apportioned to the several townships and wards of the county. If it is important to have a record, it is equally important that the record should be intelligible and certain as to its meaning, so that a tax-payer who chooses to examine it can *know*, and need not be obliged to guess, what action was taken. The records of the board for the year in

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question were so carelessly kept and badly mixed that it is impossible to tell with certainty what action was taken on the subject of equalization. The record shows the following, commencing with page 83 of volume 3 of the supervisors' record:

"Committee on equalization submit the following report, and recommended its adoption as reported. Moved by V. A. Saph, and supported by William Grace, that the report be accepted and adopted. Moved by G. S. Granger, and supported by J. A. McMartin, that the town of Port Huron be equalized at $90,000. Motion lost."

Here the subject of equalization seems to have been dropped, the next entry in the record being:

"Committee on criminal accounts, by Patrick Fox for committee, reported on sundry accounts, * * * and recommended their payment as reported."

Then follows a page or more of resolutions relating to accounts and other matters entirely disconnected with the subject of equalization, after which appears the following:

"Moved by G. S. Granger, supported by G. L. Cornell, that G. F. Collins and B. C. Farrand constitute a committee to confer with the Board of State Auditors in reference to the Yohr matter, provided the bail of Mr. Yohr pay the expenses of said committee. Lost, a majority of all the members voting against the same. [Then follows the following apparently irrelevant table:]

Brockway.	Real Estate Assessed.	Real Estate Equalized.	Personal Estate.	Tot'l Estate Assessed.	Tot'l Estate. Equalized.
	$146,065	$135,170	$25,505	$171,570	$160,765

—The majority of all the members elect voting against it.

"Moved by Mr. McMartin, supported by G. S. Granger, that the Second ward of the city of St. Clair be equalized by the sum of $1,374.95. Lost, the majority of all the members elected voting against it.

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"Moved by D. G. Finlayson, supported by James Demarest, that the township of Grant be equalized at $125,000. Lost, a majority of all the members elected voting against it. The original motion was then carried, a majority of the members voting therefor."

It is quite possible that "the original motion," which it is said was then carried, a majority of the members voting therefor, may have had some connection with the question of equalization; but it is equally possible that it did not. It is too uncertain to have any value as a public record.

At first I was of the opinion that defendant was entitled to her improvements made since her mother acquired the tax title in 1884. The objections to it as stated by plaintiff's counsel are:

1. That, as defendant claims that her mother was in possession of the land in 1873, it was her duty to pay the taxes; and that she could not acquire a tax title based on a tax which she ought to have paid. But the plaintiff says her husband, Justin L. Paldi, was in possession in 1873, and she is allowed to recover on the theory that this was true. If the possession of plaintiff's grantor was good enough to hold the title, it was *his* duty to pay the taxes, it not appearing that there was any agreement between him and his tenant (his mother) that the latter should pay them.

2. That there is no evidence that Marie Ann H. Paldi made any different claim of title after she acquired the tax title. In 1884, she bought this outstanding tax title, and put her deed of record.

My brethren are of the opinion that this was not, standing alone, such an assertion of an independent, hostile title as would entitle her to improvements; that, having been in possession in subordination to the plaintiff, any claim of an adverse holding under the tax title must have been expressly asserted and brought home to

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the plaintiff; and that the mere recording of her hostile title was not sufficient. In this view I concur.

The judgment must be affirmed, with costs.

The other Justices concurred.

ADONIRAM J. LELAND v. THOMAS GOODFELLOW.

Fraud—Bohemian oat note—Pleading—Declaration.

Plaintiff brought an action on the case to recover damages for the transfer of his note, given for Bohemian oats, to a *bona fide* purchaser without notice, whereby he was forced to pay the note. And it is held that the declaration, which is substantially set forth in the opinion, fails to state a cause of action.

Error to Genesee. (Newton, J.) Argued December 5, 1890. Decided December 24, 1890.

Case. Defendant brings error. Reversed, and cause remanded. The facts are stated in the opinion.

Rollin H. Person, for appellant.

Leland & Aldrich, for plaintiff.

CAHILL, J. The plaintiff brought suit in the Genesee circuit court, and the defendant comes to this Court on demurrer to the declaration, which was overruled in the court below.

The plaintiff's declaration is in two counts. The first count sets out substantially that in September, 1885, plaintiff was engaged in farming in the township of Rose, in Oakland county; that some time in that month defendant came to plaintiff's farm, and brought with him 25

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bushels of so-called "Bohemian Oats," which he offered to sell to plaintiff, and also to give him a bond from the Bohemian Oat Company, in words and figures as follows:

"222. A bond from the Bohemian Oat Company, to be signed by our superintendent, J. M. Orcutt.

"Rose township, Oakland county, State of Michigan, Sept. 28, 1885.

"We do hereby agree to sell 50 bushels of Bohemian oats for Mr. A. J. Leland, at ten dollars per bushel, in cash or by note, for which the said A. J. Leland is to pay 25 per cent. commission for selling. Said oats to be sold on or before December, 1886.

[Signed] "J. M. ORCUTT, Sup't."

That the defendant offered to take in payment for such oats,—

"And the bond, above set forth, which was to accompany them, and which was to be delivered to plaintiff with said oats should plaintiff purchase them, said plaintiff's note for the sum of $250, payable in February, 1887, *so that plaintiff should not be called upon to pay said note until said Bohemian Oat Company had sold for plaintiff said 50 bushels of 'Bohemian Oats,' so called, as provided for in said bond, and plaintiff had had time to realize from the proceeds thereof sufficient money to pay such note.* And plaintiff says that he believed that, if he purchased said oats of defendant, said Bohemian Oat Company would perform all the conditions of said bond, above set forth, and that, relying upon the fulfillment of the conditions of said bond, and believing that they would be performed, and that he would thereby be enabled to obtain sufficient money to pay for such oats, he accepted the offer of defendant, and then and there received from defendant the bond and 25 bushels of oats, and gave defendant in payment therefor his note for $250, payable in February, 1887."

Plaintiff further says that the Bohemian oats are and then were but little, if any, more valuable than common oats for any purpose whatever, and are not, and at that time were not, worth to exceed 30 to 35 cents per bushel. And the plaintiff says that the consideration which

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induced him to give said note was not the 25 bushels of so-called "Bohemian Oats," but such consideration was the bond which formed a part of the contract, and that he would not, and defendant well knew he would not, have made said purchase and executed his note if it had not been for the agreements contained in the bond, on which plaintiff relied, that the company would, before December, 1886, sell for plaintiff 50 bushels of oats, so that he, plaintiff, would be enabled to pay his note in February following from the money that he would have received on the fulfillment of the conditions of said bond.

The declaration further states that although plaintiff raised the oats, and had them on hand at the time set for the fulfillment of the bond, neither defendant nor the Bohemian Oat Company ever sold or offered to sell 50 bushels of Bohemian oats, and that none of the conditions of the bond were ever performed in any manner. The declaration further says that the bond was a part of the contract on which the note was given; that defendant obtained no right to enforce the collection of said note until the Bohemian Oat Company had fully performed the conditions of the bond, and had sold for plaintiff 50 bushels of so-called "Bohemian Oats," at $10 per bushel, yet the said defendant did, a short time after obtaining such note, and before it became due, wrongfully and fraudulently dispose of said note to the First National Bank of Holly, a *bona fide* purchaser without notice, and that the plaintiff had been compelled, when the note fell due, to pay it.

It will be noticed that this count contains no allegation of fraud on the part of the defendant in the procuring of this note except such as may be said to be naturally inferred from the transaction itself. Neither is there any allegation that the plaintiff was ignorant of the nature of this transaction, or that he was misled or deceived in

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any way by the defendant. The sole allegation of fraud against the defendant relates to his transfer of the note, which, it is claimed, he had no right to dispose of to a *bona fide* holder until after the Bohemian Oat Company had performed the conditions of the bond. But it is not alleged that defendant agreed not to transfer this note, nor that defendant agreed that plaintiff should not be called upon to pay his note, until the company had performed the conditions of the bond, and until the plaintiff had had time to realize from such performance sufficient to pay his note. That clause of the plaintiff's declaration which commences as follows:

"So that plaintiff should not be called upon to pay said note until said Bohemian Oat Company had sold for plaintiff said 50 bushels of Bohemian Oats,"—

and what follows, is not the averment of a fact, but is an obvious inference drawn by the pleader from the fact that the bond was, by its terms, to be performed before the note fell due. So far as anything appears from this count, the defendant was as innocent of any wrong in the transaction as was the plaintiff himself. Under such circumstances, it was not wrongful or fraudulent for the defendant to dispose of the note. It follows from this that the first count alleges no cause of action.

The second count was like the first, except that, in addition thereto, it is alleged that, a few days before the defendant called upon the plaintiff, one Alfred W. Hanmer came to the plaintiff's farm, and represented himself to be the agent of the Bohemian Oat Company, which he represented to plaintiff was a company incorporated under the laws of Michigan, with a capital stock of $100,000, for the purpose of selling Bohemian oats, which Hanmer represented were much more valuable than any of the varieties of oats commonly raised by farmers; that said oats would be worth in the market $1 per bushel

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for the purpose of being ground into oatmeal; that Hanmer further represented that a good deal of money was going to be made by a few men out of such oats, and that, for the purpose of introducing them, the company would sell a few bushels to not to exceed 15 farmers in each township, at $10 per bushel, and that said company would give to each of those who purchased said oats a bond, to be signed by the superintendent of said company, binding the company to sell for the person who should purchase any of such oats twice as many bushels of such oats as such person should purchase, at $10 per bushel, but charging such purchaser a commission of 25 per cent. for selling such oats; that Hanmer also represented to plaintiff that the Bohemian Oat Company had deposited with the Treasurer of the State of Michigan $100,000, to secure the fulfillment of the conditions of such bond; that Hanmer solicited plaintiff to give an order to said Bohemian Oat Company to deliver to him 25 bushels of said so-called "Bohemian Oats," and represented to plaintiff that, if plaintiff would give such order, he (Hanmer) would cause to be delivered to plaintiff, at the same time that the 25 bushels of oats were delivered, a bond binding said Bohemian Oat Company to sell for plaintiff 50 bushels of such so-called "Bohemian Oats," at $10 per bushel, by December, 1886; that Hanmer further stated that, if plaintiff would purchase the 25 bushels of oats, he might give his note for $250, payable in February, 1887, in payment for the same, and that plaintiff would never be called upon to pay such note until said Bohemian Oat Company had performed all of the provisions of such bond in every particular, and plaintiff had realized from the sale of such oats sufficient money to pay said note; that, relying upon the representations of Hanmer, plaintiff agreed to purchase 25 bushels of oats, and to give in payment therefor his note for $250, payable in

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February, 1887, and in pursuance of this agreement he gave to Hanmer an order, signed by him, for the delivery of the oats, which order was in words and figures as follows:

"ROSE TOWNSHIP, September 28, 1885.
"MR. J. M. ORCUTT,
"Superintendent of the Bohemian Oat Company,—
"*Sir:* Please deliver at my house twenty-five bushels of Bohemian oats, weighing fifty pounds to the bushel, for which I agree to pay J. M. Orcutt, or bearer, ten dollars per bushel, on delivery of the oats, in cash, or by note payable the first day of Feb., A. D. 1887; the company's bond to sell twice the above number of bushels to be delivered with this order. The purchaser holds a copy of this order. Any change is null and void.
[Signed] "A. J. LELAND.
"A. W. HANMER, Agent."

That, within a few days after he had given this order to Hanmer, the defendant came to plaintiff's farm, "and, in pursuance of the agreement plaintiff had made with said Hanmer, as above stated, offered *to sell to plaintiff 25 bushels of oats, which defendant then and there called 'Bohemian Oats,' and to deliver to plaintiff a bond from said Bohemian Oat Company,*" substantially as set out in the first count of the declaration. The declaration alleges that all of Hanmer's representations were false and fraudulent.

There is no doubt that, under our previous decisions, the second count contains a good cause of action, if it substantially appears that the defendant is therein made responsible for the fraudulent representations of Hanmer. *Hess v. Culver*, 77 Mich. 598; *Knight v. Linzey*, 80 Id. 396; *Pearl v. Walter*, Id. 317.

It is claimed by defendant that there is no allegation in the declaration which legitimately connects the defendant with such misrepresentation; that the allegation in the declaration "that, within a few days after plaintiff

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gave his order to Hanmer, said defendant came to the farm where plaintiff then resided, *and, in pursuance of the agreement plaintiff had made with said Hanmer, as above stated, offered to sell to plaintiff 25 bushels of oats,"* does not amount to an averment that defendant and Hanmer were acting in concert, nor that defendant knew of, or was in law or otherwise responsible for, the false statements of Hanmer; that nothing is alleged as a basis for the inference of the pleader that defendant came "in pursuance of the agreement made with Hanmer," beyond the fact that defendant came to plaintiff a few days after Hanmer had procured his order for a similar quantity of oats; that there is no allegation that defendant brought with him plaintiff's order, given to Hanmer a few days before, or that defendant said he came pursuant to such order; that, for all that appears in the declaration, Hanmer and defendant may have been strangers to each other, each acting as independent agents of the oat company, and, of course, not responsible for each other's representations. I do not see any escape from this position. The second count is defective in that it contains no sufficient allegation of defendant's complicity with and responsibility for the fraud of Hanmer. In other respects this count is like the first.

The judgment must be reversed, and the cause remanded, when the plaintiff will have 20 days in which to amend his declaration, if he desires.

The other Justices concurred.

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THE PRESTON NATIONAL BANK OF DETROIT v. THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY ET AL.

Corporations—Authority of officers—Assignment of open accounts as security—Necessity of filing—Equity—Enforcement of contract.

1. How. Stat. § 6193, providing for the filing of chattel mortgages, applies only to mortgages of goods and chattels which are capable of delivery, and not to an assignment of open accounts.
2. The by-laws of a corporation provided that one person might hold the offices of president, treasurer, and general superintendent, and vested in the president the general supervision of the property and affairs of the corporation, and in the treasurer the custody of its funds and valuable papers, with power to collect and pay out all moneys and sign all acceptances and notes in its behalf, while the superintendent was given general supervision and management of its affairs, subject to the president and board of directors, with power to make all contracts in its behalf except when otherwise provided by the by-laws. The same person held the three offices for five years, and managed and controlled the affairs of the corporation, if not without advice, certainly without objection, on the part of the stockholders or directors, and finally assigned to a bank, to secure existing indebtedness and that which should be thereafter incurred, $150,000 of good and collectible accounts, then existing or thereafter acquired, to be held by the bank as collateral security for existing and future indebtedness of the corporation. The corporation made an assignment for the benefit of its creditors, and the bank filed a bill to enforce the agreement, which is held to have been one which the president, treasurer, and superintendent had the power to make, and to be enforcible by a court of equity.

Appeal from Wayne. (Hosmer, J.) Argued November 19, 1890. Decided December 24, 1890.

Bill to enforce the assignment of certain accounts.

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Defendants Emerson and Eldred appeal. Decree affirmed. The facts are stated in the opinion.

Julian G. Dickinson, for complainant, contended:

1. The agreement operated as a delivery of such of the accounts as remain in existence, and which the court can reach by the remedy it affords to the complainant in this case; citing 3 Pom. Eq. Jur. §§ 1297, 1402, and cases cited in notes.
2. The defendant having refused and neglected to set aside the good and collectible accounts on the demand of the complainant, equity will enforce the agreement, and decree that such accounts, and the moneys and bills receivable derived therefrom, and in the hands of the defendant receivers, shall be held for the payment of the indebtedness due complainant; citing 3 Pom. Eq. Jur. §§ 1234, 1235; *Tailby v. Receiver*, 13 App. Cas. 523.
3. By the agreement the intent appears to be to assign to complainant the good and collectible accounts, which the corporation agreed to set aside as specified; therefore the agreement constitutes an equitable lien on the accounts existing or thereafter acquired in the conduct of the business of the corporation, which a court of equity will enforce; citing Pom. Eq. Jur. §§ 166, 167, 1234–1237; *Burgon v. Cabanne*, 42 Minn. 267; *Brown v. Munger*, Id. 482.
4. An assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence; citing *Kane v. Clough*, 36 Mich. 440; *Field v. Mayor*, 6 N. Y. 179; *Williams v. Ingersoll*, 89 Id. 508; *Mitchell v. Winslow*, 2 Story, 630, 638; 1 Pom. Eq. Jur. § 167.
5. Under the evidence, the non-delivery of the statements of the accounts on the books of the corporation, or copies therefrom, would be of no legal consequence accompanying this agreement. In the absence of an express agreement assigning the rights of action in controversy, a delivery of the books of account, or statements of the accounts from the books, doubtless would be evidence of the transfer of the accounts, and would tend to show the intent to transfer the rights of action; citing *Green v. Langdon*, 28 Mich. 221; *Ellis v. Secor*, 31 Id. 185; *Parsell v. Thayer*, 39 Id. 467; *Love v. Francis*, 63 Id. 181.
6. The assignor was bound not to reassert the rights of action, and is estopped by its own grant. The notice to the defendants Emerson and Eldred of the assignment to complainant is equiv-

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alent to taking possession of the fund, and they thereupon became trustees for the complainant of the choses in action; citing *Green v. Langdon*, 28 Mich. 221; *Draper v. Fletcher*, 26 Id. 154; *Ellis v. Secor*, 31 Id. 185; *Love v. Francis*, 63 Id. 181; *Brown v. Brabb*, 67 Id. 17; *Fuller v. Rhodes*, 78 Id. 36; *Sperry v. Clarke*, 76 Iowa, 503; *Greentree v. Rosenstock*, 61 N. Y. 583; *Freund v. Bank*, 76 Id. 352; *Whittle v. Skinner*, 23 Vt. 536; *White v. Kilgore*, 77 Me. 571; *Tingle v. Fisher*, 20 W. Va. 497.

7. The property intended to be set aside by the agreement is sufficiently described to render it capable of identification. The instrument indicates and directs where and what are the accounts, and from what source the future accounts were to be derived; and the undisputed facts in evidence show no difficulty of identification. The rule applicable to such agreements is that the description is sufficient if it is capable of being made certain by inquiries which the instrument indicates or directs, or by extrinsic evidence. It is not necessary that the description should be so explicit and exclusive as to supersede recourse to extrinsic proof; citing *Giddey v. Uhl*, 27 Mich. 94; *Ellis v. Secor*, 31 Id. 185; *Willey v. Snyder*, 34 Id. 60; *People v. Bristol*, 35 Id. 28; *Haskell v. Ayres*, Id. 89; *Austin v. French*, 36 Id. 199; *Sexton v. McDowd*, 38 Id. 148; *Fordyce v. Neal*, 40 Id. 705; *Howard v. Bellows*, 49 Id. 620; *DeGraff v. Byles*, 63 Id. 25; *Wade v. Strachan*, 71 Id. 459.

8. The assignees (receivers) can assert against the complainant, in behalf of the general creditors, no claim to the property which the assignor could not have asserted; citing *Brown v. Brabb*, 67 Mich. 17; *Root v. Potter*, 59 Id. 498; *DeGraff v. Byles*, 63 Id. 25; *Jones v. Graham*, 77 N. Y. 628; *Watson v. Pugh*, 51 Ark. 218.

Marston, Cowles & Jerome, of counsel for complainant, contended:

1. This assignment was for security only; it was in the nature of a chattel mortgage upon the accounts then existing, or that should thereafter accrue or be acquired in the conduct of the business of the assignor, the debtor; and a mortgage upon after-acquired goods is valid; citing *Robson v. Railroad Co.*, 37 Mich. 70; *Cadwell v. Pray*, 41 Id. 307; *Curtis v. Wilcox*, 49 Id. 425; and accounts in existence may be assigned either absolutely or as security; citing *Kane v. Clough*, 36 Mich. 436; *Neumann v. Mining Co.*, 57 Id. 97; and so may accounts not in existence, but arising upon contracts which were in existence, at the time of the assignment.

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2. But even admitting that, as to the whole or any part of the accounts, there should be doubts as to the assignment being good in law, yet we assert that an assignment of demands having no actual existence, though invalid in law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence, and the assignee in such a case would have a right to protect his interests in the accounts in a court of equity; citing *Kane v. Clough*, 36 Mich. 436, 440; *Field v. Mayor*, 6 N. Y. 179: *Mitchell v. Winslow*, 2 Story, 630, 638.

3. The assignment was valid, although but a part of a large amount was assigned, and there was no selection or setting apart of any particular accounts; citing *Haskell v. Ayres*, 35 Mich. 89; *Grant v. Bank*, Id. 515; *Iron Cliffs Co. v. Buhl*, 42 Id. 86; *Carpenter v. Graham*, Id. 191; *Howard v. Bellows*, 49 Id. 620; *Wagar v. Railroad Co.*, 79 Id. 648; and this Court has declined to follow the authorities holding a contrary doctrine, and collected in Benj. Sales, § 398 (note).

4. But, there being at no time more than $110,000 of good and collectible accounts, the assignment was of *all the good and collectible accounts*, which words the court may be called upon to define, but, when once given a meaning or construction, no more difficulty can be experienced than in determining whether a particular board is a cull or a common,—nor so much, as the fact of payment, either voluntary or by suit, would determine the question to an absolute certainty; and this could be done by a receiver appointed to take and collect the accounts.

5. As to equitable assignments, and the rights of the assignee thereunder, counsel cited 1 Pom. Eq. Jur. §§ 167-169; *Field v. Mayor*, 6 N. Y. 179; *Kane v. Clough*, 36 Mich. 440; *Peugh v. Porter*, 112 U. S. 742; *James v. Newton*, 142 Mass. 377; *Gallinger v. Pomeroy*, 3 G. Greene, 178.

6. No delivery of the accounts was necessary, a delivery of the memorandum of transfer being sufficient; citing *Ellis v. Secor*, 31 Mich. 189; and the parties might make the assignment as they chose, so long as no one else was injured or defrauded; citing *Herbstreit v. Beckwith*, 35 Mich. 94, 95.

John D. Conely, of counsel for complainant, contended:

1. In favor of the following propositions of law concerning Smith's authority to make the paper:

a—Corporations like the George T. Smith Middlings Purifier Company are private commercial enterprises, notwithstanding their form of organization. Form of corporate organization is permitted to them mainly to enable the stockholders to avoid

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the individual liability for debts to which they would be exposed if not so organized.

b—In the appointment of agents, and in the implications of authority that result from action and non-action of stockholders and directors, and from the general conduct of their business, active and permissive, they are governed by the same rules and the same inferences that exist as to natural persons.

c—Private trading corporations have the right to borrow money to carry on their business, and to give security therefor in any manner not prohibited by law; the rule with them being the same as with natural persons.

d—Private trading corporations have the power to dispose of their commercial assets by mortgage or other security for any debt which they may lawfully create, to the same extent as natural persons.

e—What a natural person may do in dealing with others he may appoint an agent to do. The rule in regard to private trading corporations as to this is the same as with natural persons.

f—Private trading corporations have the right to employ or appoint agents and servants for the transaction of their commercial business and affairs to the same extent as natural persons.

g—Such employment or appointment need not be in writing, but may be made and proved by parol, the same as with natural persons.

h—The authority of an agent or officer of a private trading corporation may be express, or it may be implied from the conduct, active or permissive, of the corporation, the same as with natural persons.

i—The authority of an officer of a private trading corporation does not depend so much on the title of the office as on the duties he is in the habit of performing; the rule of law as to this being the same as with agents of natural persons.

j—A person dealing with a private trading corporation is not bound by the specially enumerated powers of the officers of such corporation, but, as against persons so dealing, such officers must be taken to have the authority which their designations imply; and the acts of such officers made within the scope of such implied authority are binding upon the corporation; and such acts are not invalid merely because certain special and enumerated powers, not including the others, are conferred upon such officers by the express terms of the by-laws.

k—Such officers must also be deemed to possess the powers which they are permitted by the corporation to exercise, and

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their acts as such officers within the scope of the powers so permitted are not invalid merely because certain special and enumerated powers, not including others, are conferred by the express terms of the by-laws.

l—The business of obtaining bank accommodations must be regarded, so far as the question of the authority of Smith is concerned, as the ordinary business of the company, and such as he might perform as president and treasurer of the company without other authority than that shown by the nature of these offices, the language of the by-laws, and the usage of the company; and the power of giving security on the products of the business, whether manufactured goods, open accounts, or bills receivable, is but an incident to the general powers possessed and exercised by him as such president and treasurer.

m—A general managing officer of a private trading corporation, be he styled president, treasurer, superintendent, or agent, from the circumstance that he has general charge of the business of the corporation, will possess extensive powers over the products of the business that might not be possessed by an officer of another company holding the same title; the rule of law as to this being the same as with natural persons.

n—A private trading corporation has power to borrow money as incident to its power to purchase stock and materials, and, in the absence of any provision to the contrary, the president and treasurer, or other officers, acting unitedly, who make sales, attend to the finances, and who perform the duties of making provision for payment of purchases, have power to give the notes of the company for its obligations, to pledge the products of the business as security for such obligations, and to give the proper and necessary documents to complete such security; the rule of law as to this being the same as where similar executive powers are given to an agent of a private person.

o—All the commercial contracts made by an officer of a private trading corporation, within the scope of the commercial business, are good, when he is permitted by the corporation to take its entire and exclusive management; the rule of law as to this being the same as with natural persons.

p—Where the authority of an officer of a private trading corporation is left wholly or partly to be inferred by the public from powers usually exercised by such officer, it is enough if the transaction in question involves the same general powers, though applied to a distinct subject-matter; the rule of law as to this being the same as with natural persons.

q—A general manager of the business and affairs of a private

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trading corporation, in whose hands the entire management of the affairs of the corporation is permitted to be placed, may, without other authority from the board of directors, mortgage the product of the business, or give equivalent security thereon, for the debts of the corporation; the rule of law as to this being the same as with natural persons.

r—A general manager of a private trading corporation, in whose hands the entire management of the affairs of the corporation is permitted to be placed, may, without other authority from the board of directors, *assign choses in action*, the product of the business, in payment of or as security for its debt; the rule of law as to this being the same as with natural persons.

—Citing, in support of the foregoing, *Detroit v. Jackson*, 1 Doug. 106; *Kimball v. Cleveland*, 4 Mich. 606; *Joy v. Plank-road Co.*, 11 Id. 155; *Bank v. Hanmer*, 14 Id. 208; *Mining Co. v. Senter*, 26 Id. 73; *Fitch v. Hydraulic Co.*, 44 Id. 74; *Star Line v. Van Vliet*, 43 Id. 364; *Steel Works v. Bresnahan*, 60 Id. 382; *Lumber Co. v. Williams*, 73 Id. 86; *Dwight v. Lumber Co.*, 67 Id. 507; *Fay v. Noble*, 12 Cush. 1; *Bank v. Bank*, 48 N. J. Law, 513, 523, 524, 527; *Barnes v. Bank*, 19 N. Y. 152; *Curtis v. Leavitt*, 15 Id. 9; *Bates v. Bank*, 2 Ala. 452; *Smith v. Peoria Co*, 59 Ill. 412; *Smith v. Smith*, 62 Id. 493; *Mitchell v. Deeds*, 43 Id. 416; *Allen v. Navigation Co.*, 22 Cal. 28; *Bank v. Bank*, 10 Wall. 604; *Mining Co. v. Bank*, 104 U. S. 192; *Martin v. Webb*, 110 Id. 7; *McKiernan v. Lenzen*, 56 Cal. 61.

Elmer E. Kirkby, for defendant George T. Smith Middlings Purifier Company.

Atkinson, Carpenter, Brooke & Haigh, for defendant George T. Smith.

Thomas A. Wilson, for appellants, contended:

1. How. Stat. §§ 4009, 4012, gave to the board of directors of defendant corporation the entire management and control of its business and affairs; citing *Star Line v. Van Vliet*, 43 Mich. 364; *Bank v. Barge Co.*, 52 Id. 438; and a substantial compliance with the requirements of the statute was essential in order to bind the corporation; and a director, acting singly, cannot impose extraordinary obligations upon it, nor can the manager or officers, unless duly authorized by the board of directors or by-laws; citing *Doyle v. Mizner*, 42 Mich. 332; *Lockwood v. Boom Co.*, Id. 537.
2. The rule seems to be well settled that where the management

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of the affairs of a corporation is, by statute, charter, or by-laws, confided to the board of directors or committee, authority to mortgage or convey the corporate property must emanate from such board or committee, and that the president, secretary, cashier, general manager, or all combined, have no power to mortgage such property, or give equivalent security, though they possess the power to create the indebtedness; citing *Titus v. Railroad Co.*, 37 N. J. Law, 98; *Stokes v. Pottery Co.*, 46 Id. 237; *Luse v. Railway Co.*, 6 Ore. 125; *Leggett v. Banking Co.*, Saxt. Ch. 541; *Coryell v. Bridge Co.*, 9 N. J. Eq. 457; *England v. Dearborn*, 141 Mass. 590; *Fay v. Noble*, 12 Cush. 1; *Smith v. Smith*, 117 Mass. 72; *Carver Co. v. Insurance Co.*, 6 Gray, 214; *Bank v. Trust Co.*, 14 Wis. 325; *Bank v. Lucas*, 21 Neb. 280; *Bank v. Bank*, 48 N. J. Law, 513; *Duke v. Markham*, 105 N. C. 131; *Mining Co. v. Mining Co.*, 80 Mich. 491; *Lockwood v. Boom Co.*, 42 Id. 536; *Doyle v. Mizner*, Id. 332; *Bank v. Barge Co.*, 52 Id. 438; *Stevens v. Iron Co.*, 57 Id. 427; *Kendall v. Bishop*, 76 Id. 634.

3. There was no such holding out or appearance of authority in Smith, by the corporation, as to render this agreement valid. Giving the agent authority to transact the ordinary business of the corporation does not authorize him to transact business of an extraordinary character, nor warrant parties dealing with him in regarding him as so authorized; citing *Iron Mine v. Bank*, 39 Mich. 653; *Iron Mine v. Bank*, 44 Id. 358; nor can complainant claim any advantage from the fact that Smith was allowed to manage the business as he did, or because of the failure of the board of directors or stockholders to hold meetings; citing *Iron Mine v. Bank*, 39 Mich. 653.

4. The agreement does not purport to be, nor is it intended, as an absolute sale of such accounts, but as a security for existing and future indebtedness arising in the manner therein expressed. It cannot operate as a pledge, no possession of the accounts having been given to the complainant; citing *Holmes v. Hall*, 8 Mich. 66; and, being a security, in order to be of force it must be construed as a chattel mortgage of undescribed and indefinite accounts, existing and to be acquired in the future. Assignments of accounts have been frequently recognized as chattel mortgages; citing *Neumann v. Mining Co.*, 57 Mich. 97; *Sperry v. Clarke*, 76 Iowa, 503; and, if this agreement is to be construed as a chattel mortgage, the rule as to what is a necessary description of chattels in a mortgage ought to apply; and no good reason can be assigned why the same rule should not apply even though it should not be treated as a chattel mortgage.

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5. The rule that title to goods and chattels does not pass while something remains to be done by the vendor, in order to identify or set them apart, must apply to accounts, as well as any other chattels. Had a list of the accounts intended to be assigned been attached to the agreement, the case would have been much stronger; but even then, if they had not been delivered to the bank, but left, as in this case, under the control and custody of the assignor, to use as it saw fit, the bank could not maintain its case as an equitable assignment of the existing accounts; citing *Christmas v. Russell*, 14 Wall. 69; *Trist v. Child*, 21 Id. 441; *Tiernan v. Jackson*, 5 Peters, 579; *Rogers v. Hosack's Ex'rs.*, 18 Wend. 319; Coleb. Coll. Secur. § 429.

6. An equitable assignment passes all the rights of the assignor in the thing assigned, and from the time of the assignment the assignor can exercise no control over it; citing 6 Amer. & Eng. Enc. Law, 663, and note.

7. It is not every attempt to transfer or give a right to a fund that amounts to an equitable assignment. It has been repeatedly held in this State, and is a general doctrine, that a draft is not an assignment of the fund in the drawee's hands, although it is an order on him to pay the sum stated in the draft; citing *Grammel v. Carmer*, 55 Mich. 201; *Moore v. Davis*, 57 Id. 251; and an assignment of choses in action must be accompanied by a delivery of the evidence of the debt, if any; citing *Palmer v. Merrill*, 6 Cush. 282.

8. The principle asserted by these cases disposes of the complainant's claim to an equitable assignment of existing choses in action. The matter rested for the time being in agreement, and did not in law or equity amount to a present transfer; citing *Rodick v. Gandell*, 15 Eng. Law & Eq. 30; *Ford v. Angelrodt*, 37 Mo. 50.

9. The description of property in a chattel mortgage, or other paper intended as a security, must be such as to distinguish it from other property of the same kind; citing *Richardson v. Lumber Co.*, 40 Mich. 203; *Cass v. Gunnison*, 58 Id. 108; and it is to be interpreted in the light of facts known to, and in the minds of, the parties at the time it was made; citing *Willey v. Snyder*, 34 Mich. 60; *Wade v. Strachan*, 71 Id. 459; *Curtis v. Wilcox*, 49 Id. 427.

10. The agreement, if otherwise valid, is void against the classes of creditors designed to be protected by notice, because it was not filed as required by statute; citing *Brown v. Brabb*, 67 Mich. 17; and whatever doubt exists as to the necessity of such filing must be solved in favor of the creditors and against complain-

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ant; citing *Anderson v. Brenneman*, 44 Mich. 202; *Bank v. Summers*, 75 Id. 111.

Edwin F. Conely, of counsel for appellants, contended:

1. By the record it is established that Smith was not authorized in express terms, by the by-laws, to execute the instrument in question, or any other incumbrance or instrument of like character, nor was such authority given to him by any resolution of the board of directors; and, there being no other source of express authority, it is clear that he had none.

2. What, then, are the acts which Smith did as the representative of the company, which the stockholders or board of directors knowingly suffered him to do without express direction, and from which authority to execute and deliver the agreement sought to be enforced may be implied?

a—He collected and paid out money and signed receipts, etc., therefor. But, as treasurer, he had express authority for this under the by-laws. Besides, this grant of power is not broad enough to include the right to mortgage or incumber the property or estate of the principal, and no implication of greater authority than it contains can arise from an express grant.

b—He signed notes and acceptances. But, as treasurer, he had express authority for this under the by-laws, and, under the familiar principle *expressio unius est exclusio alterius*, the specification of what instruments he might execute excludes the others. Further, the implication of authority would not extend further than the scope of the power exercised in doing the act. The assumption of authority, acquiesced in by the board, to give the mere promissory notes of the company for a valuable consideration received, or to accept just drafts upon it in the ordinary course of business, would not raise the implication of power to incumber or mortgage the property or assets of the principal.

c—He borrowed money for the benefit of the company. But this was in the ordinary course of business, and in the most common manner. If the board of directors ever intelligently acquiesced in his acts in this regard, they certainly went no further than to assent to his borrowing money upon its unsecured promissory notes, or by selling, or using as collateral to such notes, commercial paper, which is the ordinary collateral available at banks.

d—He employed men, sold goods, contracted to build mills, etc. But this was in the ordinary course of business. Besides, the record shows that in November, 1884, it was not understood by Smith or the board that his power in this direction was without limitation. When it came to the employment of

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a "general office man," the authority of the board was invoked.

3. As to whether Smith had power to execute the agreement solely in virtue of his office, counsel cited *Mining Co. v. Senter*, 26 Mich. 73; *Manfg. Co. v. McAlister*, 36 Id. 327; *Fitch v. Hydraulic Co.*, 44 Id. 74; *Iron Mine v. Bank*, Id. 344; *Walker v. Railway Co.*, 47 Id. 338; *Jones v. Avery*, 50 Id. 326; *Scudder v. Anderson*, 54 Id. 122; *Mulcrone v. Lumber Co.*, 55 Id. 622; *Stevens v. Iron Co.*, 57 Id. 427; *Steel Works v. Bresnahan*, 60 Id. 332; *Bond v. Railroad Co.*, 62 Id. 648; *Whitaker v. Kilroy*, 70 Id. 635; *Lumber Co. v. Williams*, 73 Id. 86; *Ten Eyck v. Railroad Co.*, 74 Id. 226; *Eakins v. White Bronze Co.*, 75 Id. 568; and, as to powers of president, see 1 Mor. Corp. § 537, and cases cited in text and notes; and, as to powers of cashier, see Id. §§ 539, 540, and cases cited in text and notes; and it will be borne in mind that Hayes testifies that complainant agreed to loan $50,000 without security, and that the amount actually loaned in that manner was about $75,000, so that the security as taken was for an antecedent debt for the most part; citing *Hoyt v. Thompson*, 5 N. Y. 320; *State v. Davis*, 50 How. Pr. 447; *England v. Dearborn*, 141 Mass. 590.

4. But there are good reasons for holding this assignment or agreement uncertain, indefinite, and insufficient; and in this connection it should be borne in mind that the complainant is seeking specific performance, or what is tantamount to it.

a—The assignment does not specify any particular account or accounts.

b—It does not specify any known legal or definite interest in the accounts, as all, or any fractional part. Neither the "mass of accounts," nor even the mass of "good and collectible" accounts, "as a *unit*," comes under the agreement in question.

c—It does not furnish any practicable means of ascertaining and separating what the complainant on the face of the paper might demand. There is no evidence but that, when Smith gave the paper, there was $300,000 in "good and collectible" accounts, so called, whatever that term may or may not mean. Besides this, there was a large mass of accounts believed to be doubtful or worthless. What means does the contract furnish by which, without the further concurrence or acts of both of the parties, $150,000 of "good and collectible accounts" can be separated or distinguished, not only from the great mass of accounts of all kinds, aggregating over $900,000, but from the mass of good and collectible accounts, amounting, as was supposed, to "not less than $300,000?" It is argued that a receiver can be appointed to collect the accounts, and that he can upon such collection turn over $150,000 in cash, or all cash that is

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realized. But the parties did not agree that the complainant should have that amount in cash, or all the cash if $150,000 was not reached. Here again complainant's counsel make this instrument a mortgage upon *all* of the accounts, good, bad, and indifferent, when it is nothing of the kind, and it was not so intended by the parties.

5. The statute gives the assignee of a chose in action a right to sue in his own name. But let us suppose the case of an action at law by the complainant in its own name, upon some existing account, and that it undertakes to establish its title by this assignment or agreement. The result is obvious. Or, suppose a debtor of the Purifier Company, when garnished, should set up that his account had been assigned to complainant, and attempt to prove it by the paper in question, of what avail would be his claim? But, say complainant's counsel, these are proceedings at law, while we are pursuing an equitable remedy. True, but while equity may furnish a *remedy* when the law does not, it cannot make certain an agreement which would not be certain at law if the subject of such agreement were one which a legal remedy would reach. If, in the case of chattels or movables, the agreement of transfer is so indefinite that an action of replevin or trover cannot be based thereon, how, on the same agreement, may you have specific performance when the subject-matter is land or accounts, unless equity can make a new contract for the parties? citing *Blanchard v. Railroad Co.*, 31 Mich. 43.

CAHILL, J. The bill in this cause was filed to enforce the following agreement entered into July 10, 1889, by George T. Smith, claiming to act for and on behalf of the George T. Smith Middlings Purifier Company, and to be authorized as its president and treasurer to execute the same:

"WHEREAS, The George T. Smith Middlings Purifier Company is indebted to the Preston National Bank on its own paper, and for indorsements on commercial paper, and will hereafter be likewise indebted; and—

"WHEREAS, The George T. Smith Middlings Purifier Company has on its books not less than three hundred thousand ($300,000) dollars in good and collectible accounts:

"Now, therefore, said George T. Smith Middlings Purifier Company does hereby set aside and assign to the

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Preston National Bank of Detroit one hundred and fifty thousand ($150,000) dollars of such good and collectible accounts now existing, or that shall hereafter accrue or be acquired in the conduct of the business of the said George T. Smith Middlings Purifier Company, which said one hundred and fifty thousand ($150,000) dollars of the good and collectible accounts shall be held by said Preston National Bank as collateral for any indebtedness of any kind or nature which may now or hereafter be due and payable from the said George T. Smith Middlings Purifier Company to the said Preston National Bank of Detroit.

"GEO. T. SMITH MIDDLINGS PURIFIER CO.,
"By GEO. T. SMITH, President and Treasurer.
"*Dated Detroit, Mich., July* 10, 1890."

The facts material here to be considered are, substantially, as follows: The complainant is a national bank organized and doing business in Detroit. The George T. Smith Middlings Purifier Company is a corporation duly organized for manufacturing purposes under Act No. 41, Laws of 1853, p. 53, How. Stat. chap. 122, and doing business at Jackson, Mich. It was engaged in manufacturing mill machinery. It also took contracts for building mills. These contracts ran from $2,000 to $30,000 each. Its business was large, and amounted to from $400,000 to $500,000 annually. Section 9 of the act under which it is incorporated (How. Stat. § 4009) provides that—

"The stock, property, and affairs of such corporation shall be managed by not less than three nor more than nine directors, as the articles shall determine."

The articles as filed provide for three directors. Section 1 of the act authorizes it to—

"Elect, in such manner as they shall determine, all necessary officers, * * * and determine their duties, and make from time to time such by-laws, not inconsistent with the Constitution and laws of this State, as a majority of the stockholders shall direct."

The by-laws adopted relating to the officers and their duties are as follows:

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"1. The officers of this corporation shall be a president, secretary, treasurer, and general superintendent.

"2. Any person may hold two or more offices at the same time.

"3. The president shall be the presiding officer at all meetings of the board of directors, and shall have general supervision over the property and affairs of this corporation. * * * * * * * * * *

"5. The treasurer shall have charge of all the funds, deeds, patents, leases, contracts, notes, securities, and all other valuable papers of this company; shall collect and pay out all moneys, and sign all acceptances and notes in its behalf.

"6. The general superintendent shall have general supervision and management of the affairs of the corporation, subject to the president and board of directors, and shall make all contracts in behalf of the corporation except when the by-laws otherwise provide."

The by-laws relating to the meetings are as follows:

"7. The annual meeting of the stockholders shall occur on the first Monday in May of each year.

"8. The board of directors shall have regular meetings on the first Monday in May of each year, immediately after the adjournment of the stockholders' meeting, and at such other times and places as the president may direct."

On May 5, 1884, stockholders' and directors' meetings were held. George T. Smith was elected president, treasurer, and general superintendent. No other meeting of the stockholders was held until May 13, 1889. At this stockholders' meeting there were present George T. Smith, Frank M. Smith, his son, Alonzo Bennett, George S. Bennett, Francis D. Bennett, and M. Harmon. Eliza B. Smith was represented by George T. Smith, holding her proxy. George T. Smith, Frank M. Smith, and Francis D. Bennett were unanimously elected directors. Special meetings of the board of directors, called by the president, were held on November 8, 1884, on December 29, 1887, and on October 1, 1888. At each of these meet-

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ings some special matter of business, not material to this case, was transacted, but no directors' meeting for the election of officers was held from May, 1884, to May 13, 1889. A directors' meeting for the election of officers immediately followed that of the stockholders on May 13. All of the directors were present. George T. Smith was elected president and treasurer, Francis D. Bennett, vice-president, and Milford Harmon, secretary. No superintendent was elected. As the statute provides that officers shall hold until their successors are chosen, George T. Smith must be considered as holding over in the office of superintendent. The next meeting of the directors was held October 3, 1889, at which the only business transacted related to the plat of the George T. Smith addition to the city of Jackson, which was approved, and the president authorized to sell lots at the prices fixed, and to sign necessary deeds and contracts for the same in the name of the company.

The corporation made an assignment under the statute for the benefit of its creditors on January 14, 1890, to the defendants Emerson and Eldred, who have since, for reasons not material here, been removed as assignees, and appointed receivers, upon a bill filed by some of the creditors in the circuit court for the county of Wayne, to which county the proceedings relating to such assignment had been removed. *Kittridge v. Circuit Judge*, 80 Mich. 200.

It is apparent from the record that, during the last five years the corporation did business, George T. Smith was permitted to manage the affairs of the company very much as he pleased. There were no meetings of the stockholders, and no regular meetings of directors. As president, treasurer, and superintendent, he had, by the by-laws, been invested with extensive powers of management and control, and such power had been exercised by him

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freely, and if not without advice, certainly without objection, on the part of any of the stockholders or directors. It appears undisputed that the corporation was in the habit of borrowing large sums of money from the banks on its own paper, and on the paper of its customers indorsed by it. George T. Smith testified that it was necessary to the successful operation of the business that this money should be borrowed, and that he had been accustomed, since the organization of the company, to make loans, and give the company's paper therefor, whenever the exigencies of the business, in his judgment, required. No question is made here of his right to make such loans and give the company's notes.

Among other banks with which he did business was the complainant, with whom he had an understanding prior to July 10, 1889, by which the company he represented was to have a line of discounts up to $50,000. But it appears that the transactions with complainant bank greatly exceeded that amount, so that on July 10, 1889, the amount had actually reached about $70,000. At this time the bank wanted security. At an interview had with Mr. Smith by Mr. Hayes, vice-president of the bank, the subject of security was discussed, and Mr. Smith expressed himself as entirely willing to give it. He had been in the habit of leaving, as collateral to the company's paper, the paper of its customers. He now suggested that the company had a large number of accounts on its books that were good and collectible, which he estimated at $300,000, and he offered to give security on these accounts. As a result of this interview, the agreement of July 10 was drawn up by Mr. Hayes, executed by Mr. Smith, and left with Mr. Hayes. At the time this agreement was entered into, there was about $70,000 of the company's paper in the bank. Subsequently this paper was renewed from time to time as it

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fell due, and the amount was increased to $85,000. No action was taken to select out from the body of the accounts those which the complainant claimed under the agreement, nor were they ever set apart by the company as belonging to the complainant.

At the beginning of the year, Mr. Emerson had been elected vice-president and treasurer of the company, and the management of the business of the company was practically transferred to him. On January 10, 1890, Mr. Hayes, acting for the complainant, visited Jackson and called on Mr. Emerson, showed him the agreement of July 10, 1889, and told him that the bank was anxious to have these accounts to secure the bank's indebtedness. It does not appear that Mr. Hayes expressly requested Mr. Emerson to turn out to him any specified accounts under such agreement, but it is clear that Mr. Emerson must have understood that Mr. Hayes was there for the purpose of taking some steps that would secure to the bank whatever right was needed to make its agreement good. Mr. Emerson testified that this was the first knowledge that he had of the existence of the agreement, and it does not appear that, prior to this time, any of the directors or officers of the company, aside from Mr. Smith, had any knowledge of its existence. After taking time to consider, Mr. Emerson denied the validity of the agreement, and Mr. Hayes, on January 11, caused the agreement, or a copy of it, to be filed in the office of the city clerk, as a chattel mortgage is required to be filed. On January 14 following, the assignment was made, as before stated. Three questions are discussed by counsel:

1. Did George T. Smith have authority to execute the agreement of July 10 so as to bind the company?

2. Is the agreement such a one as can be enforced, conceding it to have been made by due authority?

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3. Conceding the agreement to be valid as between the parties, is it void as to creditors who became such between July 10, 1889, and January 11, 1890, because the instrument was not filed?

1. As to the authority of Mr. Smith to execute the agreement for the company. We have seen that the general powers conferred upon Mr. Smith by the by-laws were very extensive, and that the powers so conferred were actually exercised by him with very little supervision by the board of directors from 1884 to 1890. The language of the by-law defining his duties as president is quite as broad as the provision of the statute concerning the powers of the directors. The statute says the stock, property, and affairs of the corporation shall be managed by a board of directors. How. Stat. § 4009. The by-law says the president "shall have general supervision over the property and affairs of the corporation." By section 1 of the statute, the stockholders have power to determine what the officers shall be, and to define their duties. How. Stat. § 4001. Conceding that the president must exercise his powers of management in subordination to the board, yet, when, as in this case, the stockholders, being the owners, have seen fit to vest certain extraordinary powers of management in the president, and certain other powers in the treasurer and superintendent, and the directors, with full knowledge of this, elect a man to fill all those offices, and thereafter put no restraint upon his management, the board must be held to have consented to his exercising all the power reasonably included in the language by which it was conferred. *Bank v. Comegys*, 12 Ala. 772. The right of the directors to make the security in question is not disputed, yet their authority is given in language no broader than that which defines the duties of the president.

If it be said that the stockholders could not thus usurp

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the powers of the board and confer them on the president, it may be said that the right of the directors to delegate certain of their powers of management to the officers is undoubted, and, if the consent of the board was needed to fully invest the president with the power given to him in the by-laws, that consent has been given in this case. The question of Mr. Smith's power is largely one of intention on the part of the stockholders and directors. As bearing upon this question of intention, the fact that no corporate meetings were held for five years after the by-laws were adopted is an important circumstance. It is claimed that the neglect to hold corporate meetings can have no bearing in this case, because it is not shown that complainant knew of this fact, or was influenced by it; and we are referred to the case of *New York Iron Mine v. Negaunee Bank*, 39 Mich., on page 655, where some language of Mr. Justice COOLEY to that effect is found. In that case the only question was whether the bank had been influenced to rely upon Wetmore's apparent authority, which did not in fact exist, to make the paper in question. The question is different here. It is not one of apparent power to do an act conceded to be fraudulent and void unless the corporation was estopped by its conduct to allege the fraud, but it is a question of actual power in Mr. Smith, as the president, treasurer, and manager of this corporation, to perform an act entirely legal and proper if authorized. The intention to confer such power may be evidenced by their failure to act in opposition to or in restraint of a course of business they have themselves permitted if not established.

It is an ordinary occurrence for manufacturing or trading concerns, whose products have sometimes to be carried to await a favorable market, to draw against such products for the money needed to carry them, and, if requested, some form of security upon such products is

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given. If this be permissible, shall the right to give security exist only so long as the goods are in store, or may they be sold on credit, and the accounts due for such sales be substituted with the consent of the creditor? If not, then trade is hampered, the debtor is put into the hands of the creditor, and the latter cannot release him, if he would, without risk. The right of Mr. Smith as president and treasurer to borrow money for the legitimate needs of the business, and to give the company's paper, is not contested. The duty to pay is involved in the power to incur debts. In the case of this corporation, its power to pay its debts depended on the profitable sale of its products, and the collection of the money due on such sales. If it could not otherwise dispose of its products, it could turn them out to its creditors in payment of or as security for such debts. If its goods were sold on credit, these credits stood as the representatives of the goods, and the same use could legitimately be made of them. This is not like giving security upon all the corporate property, the enforcement of which may involve the corporate existence. The giving of this security or its enforcement did not necessarily interfere with the prosecution of the corporate business. It was given upon property and credits already devoted in equity and good conscience to the payment of its creditors, of whom the bank was one. The effect of it was simply to give complainant priority of lien.

We have been cited to a large number of decisions to show that no such power as was here assumed by Mr. Smith can be exercised by any agent of a corporation without express authority to do that act from the board of directors. It is not necessary to review them here. I have examined them with care. They are not altogether free from conflict, although if the exact point necessary to be decided in each case be kept in mind, and the

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language used be given no broader meaning than the facts of the particular case require, the conflict will be found to be more apparent than real. *Kimball v. Cleveland,* 4 Mich. 606; *Joy v. Plank-road Co.,* 11 Id. 155; *Peninsular Bank v. Hanmer,* 14 Id. 208; *Adams Mining Co. v. Senter,* 26 Id. 73; *New York Iron Mine v. Negaunee Bank,* 39 Id. 644; *Star Line v. Van Vliet,* 43 Id. 364; *New York Iron Mine v. Citizens' Bank,* 44 Id. 357; *Eureka Iron & Steel Works v. Bresnahan,* 60 Id. 332; *Dwight v. Lumber Co.,* 67 Id. 507; *Delta Lumber Co. v. Williams,* 73 Id. 86; *Genesee Co. Sav. Bank v. Michigan Barge Co.,* 52 Id. 438; *Kendall v. Bishop,* 76 Id. 634; *Stokes v. Pottery Co.,* 46 N. J. Law, 237; *Bank v. Bank,* 48 Id. 527 (7 Atl. Rep. 327); *Fay v. Noble,* 12 Cush. 1.

In this connection it need scarcely be said that the strict limitations that govern public corporations and their officers are not to be applied with the same strictness to private business corporations. There are no questions of public interest to be affected by the exercise of corporate power by one agent rather than another in a private corporation. No questions of public policy are involved. The concern is purely private, affecting no one but the owners. What the owners consent to expressly or permissively they ought not to be allowed afterwards to deny. Mor. Priv. Corp. § 632; *Steel Works v. Bresnahan,* 60 Mich. 332. In *Genesee Co. Sav. Bank v. Michigan Barge Co.,* 52 Mich. 443, Judge SHERWOOD uses this language:

"All the stockholders having any interest in the Barge Company had knowledge of the transaction; substantially that Ferry & Brother ran the Barge Company."

The same is true of Mr. Smith in this case. Every stockholder and director knew, or would have learned if they looked into its affairs, as they were bound to do, that George T. Smith ran the purifier company; that he

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assumed to do this by force of the by-laws, which on their face gave full authority; and that by years of practice his construction of the by-laws had been acquiesced in.

2. Is the agreement such a one as can be enforced by a court of equity, conceding it to have been made by due authority? It is urged by defendants' counsel that it contains infirmities which render its meaning doubtful, if they do not wholly prevent its taking effect as a valid contract. The thing principally relied on in support of this position is that the agreement is not sufficiently certain in its description of the property. It is said that no particular accounts were designated in the instrument, and no steps were provided for or taken by the parties afterwards to select out such accounts as were intended to be covered; that there is now no way of identifying those which the complainant claims. The accounts are designated as $150,000 of good and collectible accounts now existing, or that shall hereafter accrue or be acquired in the conduct of the business. The objection to this description is that, as these accounts were to be selected out of a mass of not less than $300,000 of similar accounts, there is no way of making the selection without the further concurrence or acts of both the parties; that to make such selection requires the exercise of judgment upon the part of some one, and the instrument does not designate whose judgment shall control.

The important thing to be determined is—

1. What the parties intended.
2. Whether they have so expressed their intentions that the court can execute them.

It was not supposed by the parties that the security would cover all the good accounts on the books of the company. It was estimated that they would aggregate

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not less than $300,000, and of these there were set aside for the bank $150,000. It was contemplated that the accounts were good, and that the bank should have them at their face value, and not necessarily enough of them to realize that amount in cash. This indicates that it was not intended to wind up or cripple the company in its business. It is equally clear that it was expected the particular accounts intended to be assigned were to be at some time, if it became necessary to enforce the security, selected from the body of similar accounts, and turned over to the bank for collection. How was it expected the selection would be made? It must be made in such a way, of course, as to give neither party any advantage over the other. If there were several grades from which the selection was to be made, the task might be difficult, as in the case of lumber and other commodities that are graded in the markets into several classes greatly varying in value. But there can be only two grades of accounts, the good and collectible, and the bad and uncollectible. If an account is good and collectible it cannot be any better, and if it is bad and uncollectible it cannot be any worse. If the selection be left to agreement between the parties, the security might be defeated altogether by a failure to agree, and, if left to the company, the bank might be defrauded by having poor accounts set off to it, whereas the bank was entitled to the best accounts on the books to the extent called for by the agreement, because by no process of selection could it secure any better than the contract called for. Equity would require the selection to be made so as to give neither party an advantage. As this could only be accomplished by allowing the bank to make the selection, the parties must be held to have so intended. It is clear also that it was not intended that the security should be confined to the

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accounts standing on the books of the company on July 10, 1889, but that it should extend to and include accounts that should afterwards accrue or be acquired in the conduct of the business.

Having ascertained what the parties intended by their agreement, we have, by the same process, determined the second proposition. If the agreement is sufficiently definite and certain so that the intention of the parties can be determined, then the courts can specifically enforce it, if it be also one that ought to be enforced. If the agreement had contained the words "to be selected by the bank," and the bank, immediately upon the execution of this agreement, had called on the company to allow it to select out the accounts assigned to it, and such request had been refused, I have no doubt of the power of a court of equity to compel the company to give the permission. If that was the intention, how is the difficulty any greater? The intention was that the security should be a continuing one, giving the same lien upon accounts afterwards accruing as upon those actually existing when the contract was made. The right of a debtor to give security upon property to be by him afterwards acquired in the course of business has been recognized in this State in numerous cases, commencing with *Leland v. Collver*, 34 Mich. 418. See, also, *Cigar Co. v. Foster*, 36 Mich. 368; *Robson v. Railroad Co.*, 37 Id. 70; *Eddy v. McCall*, 71 Id. 497; *Fuller v. Rhodes*, 78 Id. 36. I can see no reason that will support those cases which will not apply with equal force to this.

3. The last point urged against the validity of this agreement is that it was in effect a chattel mortgage, and is therefore void as to the creditors of the company represented by the receivers, because not filed in the office

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of the city clerk, under How. Stat. § 6193, which reads as follows:

"Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a non-resident of the State, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the property is."

This statute cannot be construed to apply to the agreement in this case. It applies only to goods and chattels which are capable of delivery, and the filing of the security is to take the place of such delivery, when it is not made, as it might have been. There is no way in which an account can be delivered. It has no tangible entity, and exists only as an incorporeal right. Neither the thing itself nor any evidence of it is capable of delivery. Similar statutes in other states have received this construction. *Monroe v. Hamilton*, 60 Ala. 226, 233; *Kelly v. Thompson*, 2 Heisk. 278, 281; *Bank v. Huth*, 4 B. Mon. 423, 449; *Newby v. Hill*, 2 Metc. (Ky.) 532; *Brady v. State*, 26 Md. 296; *Marsh v. Woodbury*, 1 Metc. (Mass.) 436; *Williamson v. Railroad Co.*, 26 N. J. Eq. 398, 403; *Booth v. Kehoe*, 71 N. Y. 341, 344; *Bacon v. Bonham*, 27 N. J. Eq. 209, 212; *Kirkland v. Brune*, 31 Grat. 127; *Bank v. Gettinger*, 3 W. Va. 317; *Tingle v. Fisher*, 20 Id. 497. The duty to file arises under the statute, and of

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course only such instruments need to be filed as are covered by the statute.

No fault is found with the form of the decree, if complainant is entitled to the relief payed for.

The decree will be affirmed, with costs.

LONG and GRANT, JJ., concurred with CAHILL, J.

CHAMPLIN, C. J. I cannot concur in the opinion of my brethren in this cause. I place my dissent upon the ground that the contract which is sought to be specifically performed is too uncertain and indefinite as to the subject-matter to be specifically enforced. No property is described so that the court can lay hold of it and compel performance. Its identity is not now defined, and I cannot see how this Court can decree the specific performance of an agreement which is yet to be ascertained through a selection made by complainant. Were it a sufficient contract as to accounts in existence at the time the contract was made, I do not think future accounts could be included in its terms, and be specifically performed. This adds uncertainty to uncertainty as to the subject-matter of the contract.

MORSE, J., concurred with CHAMPLIN, C. J.

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JANUARY TERM, 1891.

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THE CITY SAVINGS BANK OF DETROIT v. GEORGE C. HUEBNER, TREASURER OF WAYNE COUNTY.

County treasurer—Designation of depository—Expiration of term.

Act No. 393, Local Acts of 1879, authorizing the county treasurer and board of auditors of Wayne county to designate a depository for the public funds, is construed as follows:

a—In making such designation the treasurer and board have an equal voice.

b—Such designation is good and valid until the expiration of the term of office of the county treasurer, and until a new designation is made by his successor and the board of auditors, which it is their duty to make as soon as convenient after the treasurer qualifies and enters upon the discharge of the duties of his office, and without unnecessary delay.

c—Until such new designation is made, it is the duty of the treasurer to deposit the public funds in the existing depository or depositories.

Mandamus. Submitted January 13, 1891. Granted January 14, 1891.

Relator applied for *mandamus* to compel respondent to deposit with it certain funds of the county, in accordance with a contract claimed to have been entered into by it in December, 1890, with the board of auditors and outgoing county treasurer, by which relator was to act as depository of such funds for a term of two years.

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Corliss, Andrus & Leete, for relator.

William J. Gray and *F. A. Baker,* for respondent.

Edwin F. Conely, for board of auditors.

PER CURIAM. Upon the argument of this motion, the board of auditors have, by our premission, intervened, so that the Court has before it the City Savings Bank, claiming to be a depository of public funds, the treasurer, and the board of auditors, who represent the county of Wayne, and who (the treasurer and board) are authorized to designate the depositories under the law. We are first to construe the act of 1879. This is necessary, as the relator claims that it entered into a contract with the out-going treasurer and the board of auditors to act as a depository for the term of two years. The question arises whether the treasurer and board have, under the law, the right to contract for a term of years; and, if so, can they contract beyond the incumbency of the person who holds the office of county treasurer for the time being? We are all agreed upon the following propositions as the proper construction of the statute of 1879:

1. It is not competent for a county treasurer and board of auditors to contract for depositing the public funds beyond the expiration of the term of office of the incumbent of the office of county treasurer for the time being, but a designation of a depository by the treasurer and board is good and valid until the expiration of the term of his office, and until a new designation is made by the newly-elected county treasurer and board.

2. It is the duty of the newly-elected county treasurer and board of auditors, as soon as convenient after the treasurer qualifies and enters upon the duties of his office, and without unnecessary delay, to designate one or more depositories, in accordance with the statute; and, in mak-

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ing such designation, the treasurer and board have an equal voice.

3. The designation by County Treasurer Phelps and the board, dated December 9, and carried into effect December 31, 1890, is valid until the end of Mr. Phelps' term, and until a new depository is designated by Treasurer Huebner and the board. Beyond that the contract is ineffectual, and gives to relator no vested right to retain the funds.

4. Until such new designation, it is the duty of the treasurer to deposit the public moneys in the designated depositories.

The *mandamus* will issue in accordance with this opinion.

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WILLIAM HAMILTON v. ERASTUS PECK, CIRCUIT JUDGE OF INGHAM COUNTY.

Pleading—Assumpsit—Bill of particulars.

1. A specification in a bill of particulars of an item of plaintiff's demand as two-thirds of whatever sum remained in defendant's hands of $412,250, received by him for certain bonds and stock of a specified railroad company, after paying certain notes, describing them, but not giving their amount, is too uncertain and indefinite in the amount claimed, and should be amended or made more specific in this respect.

2. An order requiring a plaintiff to file an amended or more specific bill of particulars, under a common-count declaration in *assumpsit*, showing how and by what right and when the plaintiff or his assignors became entitled to each item of plaintiff's claim as stated in his original bill of particulars, and how and when he acquired such right, calls for information not required to be given in a bill of particulars.

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8. The following general propositions are summarized from the opinion:

a—By the practice of this Court, certain items are provable under the common counts in *assumpsit*, and upon demand a bill of particulars of such items must be furnished, which must be sufficiently specific and certain to apprise the defendant of what the demand is, and when the items accrued, and how it arose, and the amount claimed.

b—The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy. *Cicotte v. County of Wayne*, 44 Mich. 174.

c—If the specifications in a bill of particulars do not accord substantially with the facts, or omit essential matters, the other party can take advantage of this upon the trial. *Matthews v. Hubbard*, 47 N. Y. 428.

d—In mentioning dates, it is not necessary that the exact date shall be given, but it may be stated as "on or about a certain day," and in that case the plaintiff is not restricted to proof of that special day. The question to be determined at the trial in each case is whether the proof is so variant from the date alleged as to mislead the opposite party.

e—A bill of particulars is not required to contain all of the essentials of a special declaration. It is neither given nor required for the purpose of disclosing to an adverse party the proof relied on to substantiate the same; nor is it the office of such bill to furnish to the defendant facts whereon to found an affirmative defense. It need not state the grounds on which the plaintiff claims, but only the items and particulars.[1]

Mandamus. Submitted January 13, 1891. Granted in part January 16, 1891.

Relator applied for *mandamus* to compel respondent to vacate an order requiring plaintiff to file an amended bill of particulars. The facts are stated in the opinion.

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[1] See the following cases relating to this subject: *Cicotte v. County of Wayne*, 59 Mich. 510 (head-note 6); *Nugent v. Teachout*, 67 Id. 571; *Wright v. Dickinson*, Id. 580; *Feiertag v. Feiertag*, 73 Id. 297, 80 Id. 489; *Shadock v. Plank-road Co.*, 79 Id. 7; *Tate v. Hamilton*, 81 Id. 221.

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S. L. Kilbourne (*Otto Kirchner*, of counsel), for relator.

Frank L. Dodge (*F. A. Baker*, of counsel), for respondent.

PER CURIAM. This is an application for a *mandamus* to compel the circuit judge of Ingham county to vacate an order, made in the case of *William Hamilton v. James M. Turner*, requiring the plaintiff—

"To file an amended or more specific bill of particulars, therein showing how each item of plaintiff's claim, as stated in the bill of particulars already filed, arose, with the date and amount of same, and how and by what right and when the plaintiff or his assignors became entitled, and how and when the plaintiff acquired such right; also at what time and in what way defendant became liable or indebted to the plaintiff or his assignors for the several items in said bill of particulars now filed in said cause."

The order also gave leave to plaintiff to file an amended declaration, if he desired to do so. The declaration filed was upon the common counts in *assumpsit*, in which, in some of the counts, the plaintiff alleged an assignment to him of the interests held by two other persons in certain specified items.

The defendant demanded a bill of particulars, which was furnished, consisting of five specified items, as follows:

"1. Two-thirds of whatever sum remained in defendant's hands of the four hundred twelve thousand two hundred fifty dollars received by defendant on or about February, A. D. 1878, from William H. Vanderbilt, for certain bonds and stock of the Chicago & Northeastern Railroad Company, after paying certain notes made or indorsed for the accommodation of William L. Bancroft by the defendant, Alexander McFarlane, lately deceased, William B. McCreery, and the plaintiff, or by any or either of them, for and on account of the construction of the said Chicago & Northeastern Railroad.

"2. Two-thirds of one hundred twenty-five thousand

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dollars received by the defendant from Russell Sage, of New York, on or about the fourth day of April, A. D. 1878, for two hundred and fifty bonds and seventeen hundred and fifty shares of the stock of said Chicago & Northeastern Railroad Company.

"3. Two-thirds of twenty-three thousand eight hundred twenty dollars received by the defendant from Mr. E. W. Meddaugh, and credited to defendant on a note held against him by Mr. Russell Sage, of New York, on or about November, A. D. 1878, for certain shares of stock of the Chicago & Northeastern Railroad Company.

"4. Two-thirds of one hundred seventeen thousand dollars received by defendant by the hands of Mr. Whitehouse, of New York, about January, A. D. 1884, for one hundred seventeen bonds of the said Chicago & Northeastern Railroad Company.

"5. Two-thirds of sixty thousand dollars received by defendant for the following 'receivers' certificates,' so called, issued pursuant to orders made by the circuit court of the United States for the Eastern District of Michigan, in equity, in a cause wherein the Union Trust Company, of New York, was complainant, and the Chicago & Lake Huron Railroad Company and others were defendants, to wit: Certificate No. 1, for twenty-five thousand dollars, and certificate No. 2, for one thousand ninety-seven and twenty one-hundredths dollars, both issued pursuant to an order made by said court on the twenty-second day of November, A. D. 1876, on account of the Eastern Division of said Chicago & Lake Huron Railroad; certificates numbers 4, 5, 6, and 10, for five thousand dollars each, and certificate No. 11, for five thousand eight hundred sixty-four and fifty one-hundredths dollars, issued pursuant to an order of said court made on the thirtieth day of October, A. D. 1876, as amended by a supplemental order made on the twenty-second day of November, A. D. 1876, and dated the thirteenth day of December, A. D. 1876, on account of the Western Division of said last-named railroad; and certificates numbers one and two, issued by an order of said court made on the twenty-fifth day of June, A. D. 1877, and dated the same day, for ten thousand dollars each, on account of said Western Division.

"The plaintiff claims interest on the several moneys above claimed. The plaintiff claims to recover said moneys above specified, and interest thereon, in his own right.

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"The plaintiff also claims to recover other moneys, the description whereof is identical with those above specified, in his own right, and also as assignee of William B. McCreery, and interest thereon."

In *Cicotte v. County of Wayne*, 44 Mich. 174, it was said that—

"The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy."

If the specifications do not accord substantially with the facts, or omit essential matters, the other party can take advantage of this upon the trial. *Matthews v. Hubbard*, 47 N. Y. 428. In mentioning dates, it is not necessary that the exact date shall be given, but it may be stated as "on or about a certain day," and in that case the plaintiff is not restricted to proof of that special day. The question to be determined at the trial in each case is whether the proof is so variant from the date alleged as to mislead the opposite party.

It is not required that the bill of particulars shall contain all the essential elements of a special declaration. It is neither given nor required for the purpose of disclosing to an adverse party the proof relied on to substantiate the same; nor is it the office of such bill to furnish to defendant facts whereon to found an affirmative defense in his behalf. It need not state the grounds on which the plaintiff claims, but only the items and particulars. *Seaman v. Low*, 4 Bosw. 338; *Fullerton v. Gaylord*, 7 Rob. (N. Y.) 551; *Higenbotam v. Green*, 25 Hun, 214. If the rule were otherwise, a declaration upon the common counts would be practically abolished, for the defend-

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ant could, by demanding a bill of particulars, compel the plaintiff, in effect, to file a special declaration.

By the practice of this Court, certain items are provable under the common counts, and upon demand a bill of particulars of such items must be furnished, which must be sufficiently specific and certain to apprise the defendant of what the demand is, and when the items accrued, and how it arose, and the amount claimed. The order in this case went much further than this. It required the plaintiff to state how and by what right and when the plaintiff or his assignors became entitled, and how and when the plaintiff acquired such right. This, in *assumpsit*, is mere matter of inducement, and is not absolutely necessary to be stated in pleading. 1 Chit. Pl. 296. In these respects the order went beyond the requirements of a bill of particulars.

All the items in the bill of particulars are for money had and received, and are provable, if at all, under that count. It is not apparent how the statement of the right of the plaintiff to the items named, and when the plaintiff or his assignors became entitled to such right, or when and how they acquired such right, is essential to enable the defendant to prepare his defense. It is only necessary in a declaration for a plaintiff to state his right or title in general terms. The evidence by which such right or title is to be established is not necessary to be stated in the pleading of the plaintiff.

We think that the second, third, fourth, and fifth items of the plaintiff's bill of particulars are sufficiently specific. They specify the amount of money had and received by the defendant, how the amounts arose, and the date, with sufficient certainty. They come within the ruling of this Court in *Wright v. Dickinson*, 67 Mich. 580. The first item does not come within our previous

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rulings. It is too uncertain and indefinite in the amount claimed, and should be amended or made more specific in this respect.

The order complained of must be vacated as to items numbered 2, 3, 4, and 5, and modified as to item No. 1, so as to require a more specific bill as to this item, stating the amount claimed.

GEORGE C. LAWRENCE v JAMES HANLEY, SHERIFF OF WAYNE COUNTY.

Elections—Vacancy—County officer—Appointment by Governor—Special election—Mandamus—Title to office.

1. The death of a person elected to the office of auditor of Wayne county before he has qualified, and before the expiration of the term of office of the incumbent, creates no vacancy that the Governor can fill by appointment, but the full term must be filled by a special election under How. Stat. §§ 138 (subd. 3), 141; the case being ruled by *People v. Lord*, 9 Mich. 227.
2. Title to office will not usually be settled in *mandamus* proceedings, but when a person in office *de jure et de facto* is interfered with by one whose lack of title is plain under adjudicated cases in our own courts, it is not only proper, but best, to settle the question by *mandamus*.

Mandamus. Submitted January 20 and 21, 1891. Granted January 23, 1891.

Relator applied for *mandamus* to compel the respondent to return to the relator, as chairman of the board of auditors of Wayne county, the books belonging to said board, and for other relief. The facts are stated in the opinion.

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Henry M. Duffield, for relator.

William J. Gray, Fred A. Baker, and *William S. Sheeran,* for respondent.

MORSE, J. The real controversy in this case is the conflicting claims of two persons to the office of county auditor of Wayne county.

The admitted facts are as follows: Charles P. Collins was a duly-elected county auditor, and the regular term of his office would have expired on December 31, 1890. His successor was by the statute to be elected on November 4, 1890, at the general election. Candidates were nominated by the different political parties, and Joseph Nagel was duly elected as such successor. Before the expiration of Collins' term, and before Nagel had taken any steps to qualify, Nagel died, on December 9, 1890. On January 6, 1891, the Governor appointed Henry J. A. Leteker to fill the supposed vacancy caused by the death of Nagel. Collins, under legal advice, and claiming that there was no vacancy in the office that could be filled by appointment of the Governor, and that he held the office under the laws of this State until his successor was duly elected and qualified, refused to vacate his office.

There are three county auditors of Wayne county, who compose the board of county auditors. Each is chosen for the full term of three years. At each biennial general fall election one is chosen, and, in the years when no such election is held, one is elected by the board of supervisors of Wayne county. How. Stat. § 511. The auditor having the shortest time to serve is chairman of the board of auditors. How. Stat. § 512. The auditors elected as above provided shall hold their offices for the term of three years, and until their successors shall be elected and qualified. How. Stat. § 511.

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At the time of Leteker's appointment, the board of auditors was unquestionably composed of George C. Lawrence, the relator, chairman, and James Holihan, whose term would expire on December 31, 1892, and Charles P. Collins, holding over until his successor was elected and qualified. Upon the appointment of Leteker this controversy commenced. Leteker demanded the office of Collins, who refused to surrender it. Holihan recognized Leteker, and Lawrence sided with Collins, and at once there were two boards of auditors in session; Holihan and Leteker on one side, and Lawrence and Collins on the other. The sheriff of Wayne county, the respondent, recognized Holihan and Leteker, and the police department recognized Lawrence and Collins.

It is claimed by the relator that the respondent took the books of the board by force away from Lawrence, the chairman of the board, and his petition prays for an order directing the respondent to return the books to the relator, and to no one else, and that he be restrained from interfering with the contest for said office of auditor between said Collins and Leteker, and do recognize the relator, Lawrence, and Holihan and Collins as the board of county auditors, to the exclusion of Leteker.

The sheriff answers, in substance, denying that Collins is a member of such board, and that the relator, as chairman of said board, is entitled to the books in question, but avers that the same belong to the custody of the board. He claims that on the day he took possession of the books he was summoned to the auditors' office by Holihan and Leteker, a majority of said board, to furnish them assistance in maintaining order in said office. He found Collins, Lawrence, Holihan, and Leteker sitting at the desk in said office. He directed two of his deputies to remain in the office, with instructions that they were

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there to preserve order, and for no other purpose, and thereupon left the room. Shortly afterwards, as he is informed and believes, Collins departed from the office, leaving Leteker in peaceable possession of the same. About 2 o'clock in the afternoon of the same day he was again summoned to the office to "maintain order and preserve the peace," and, going there, found Collins, Leteker, Holihan, and Lawrence present, together with the attorney of said Collins, who sent for policemen, who also soon appeared to the number of half a dozen. His answer as to what took place there is not material to this issue, except in so far as it shows how the respondent became possessed of the books. He says that the relator, Lawrence, had changed the combination of the safe for the purpose of excluding Holihan and Leteker therefrom, and undertook to place the books therein beyond the reach of said Holihan and Leteker. Holihan attempted to resist such disposition of the books, and he and Lawrence became engaged in a scuffle for the possession of them. Fearing a row and danger to the persons of said Holihan and Lawrence, the respondent took the books away from said Lawrence, and carried them to his own office, in the same building, and placed them in his safe for safe-keeping. He says he returned them the next morning "to the said board," but he does not say which board; but it appears further along in his answer that he returned them to Holihan and Leteker, and that every night since he has locked them up in his safe, at the request of Holihan and Leteker, and returned such books to them each morning.

It further appears in the case that ever since there have been two boards attempting to exercise the duties of county auditors; that the treasurer of the county recognizes Holihan and Leteker as such board, and that

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they are drawing orders upon the county treasury as such board, but that the depository of the funds, provided and designated by law, refuses to honor the orders or warrants of said Holihan and Leteker, unless the same are countersigned by Lawrence as chairman, and Lawrence refuses so to countersign them, so that no money can be drawn from the funds of the county to pay the daily expenses of said county.

It is always an unseemly spectacle when one undertakes to obtain an office by force, and another resists such attempted taking. It is not only demoralizing to the public service, but it creates disorder, riot, and often bloodshed. It can never be countenanced by the courts. And it is not for the sheriff or the police force to take sides in such a contest as they did here. It is evident that the sheriff went beyond his duties as a peace-officer, and used the authority of his high office to install Leteker into the office of county auditor by giving him possession of the books, which, when taken by the sheriff, were lawfully in the possession of Lawrence, as against the sheriff, and all other persons except the legally qualified members of the board of county auditors. The claim that Collins was ever legally or peaceably dispossessed of the office is untenable. He never abandoned his office, and the mere fact that he left the room for a little while could give Mr. Leteker no new or added rights in the premises.

This would dispose of the matter at present before us, but it does not settle the question really in issue. We deem it for the public good, the case being to us so clear, to decide here and now the question of the right to the office as between Collins and Leteker. This is not usual in *mandamus* proceedings, *quo warranto* being in most cases the most appropriate proceeding to test the right to hold an office; but the exigencies of the case, as we view

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it, and the public interest, demand that the question shall be speedily determined, which cannot be done by *quo warranto*. And when a person in office *de jure et de facto* is interfered with, by one whose lack of title is plain and governed by adjudicated cases in our own courts, it is not only proper, but best, to settle the question by *mandamus*. See *State v. Mayor, etc., of Atlantic City*, 19 Atl. Rep. 780.

We think the title to this office is clearly ruled by *People v. Lord*, 9 Mich. 227. There was no vacancy occasioned by the death of Nagel that the Governor could fill by appointment. The statute in relation to the board of auditors clearly provides that each member elected shall hold his office three years, *and until his successor shall be elected and qualified*. It is not denied that Collins was a county auditor *de jure* as well as *de facto* until January 6, 1891, when Letcker received his commission from the Governor, and he was county auditor *de jure* because his successor had not been elected and qualified. In such a case as this, How. Stat. § 138, clearly provides for the choice of a successor to Collins by a special election to be called by the board of supervisors of Wayne county.

"When the right of office of a person elected to any of the aforesaid district or county officers shall cease before the commencement of the term of service for which he shall have been elected,"—which is Nagel's case,—the term is to be filled by a special election. See paragraph 3, § 138, How. Stat.; section 141, How. Stat. The Legislature in 1873 passed an act authorizing the Governor—

"To appoint a suitable person, being a resident of Wayne county, to fill any vacancy now existing, or which may hereafter occur, in the office of auditor of said Wayne county." 3 Laws of 1873, p. 1.

But this is not such a vacancy as is contemplated by this statute. This is a case where the full term is to be

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supplied, because the person elected to fill such term has died before his term commenced. It is the plain intention of all the statutes, taken together, that this office shall be an elective one, and the Governor is not authorized to fill it for a full term. This must be done in such a case as this by a special election.

In the case of *People v. Lord*, 9 Mich. 227, the Constitution provided that "when a vacancy occurs in the office of judge of the Supreme, circuit, or probate court it shall be filled by appointment of the Governor." In that case at the general election held in November, 1860, Oscar F. North, then judge of probate of Oakland county, whose term would expire December 31, 1860, was elected his own successor. November 22, 1860, North died, and the Governor, four days later, appointed Jacob Van Valkenburgh to fill the vacancy. January 1, 1861, the Governor, acting upon the supposition that the appointment of Van Valkenburgh ceased on the termination of North's term, December 31, 1860, appointed Henry W. Lord to fill the same, who entered upon the duties of his office, claiming to hold the same for the full term for which North was re-elected. The board of supervisors called a special election to fill the office, and at such special election Henry C. Andrews was elected judge of probate to fill out the said term. The Constitution provides that the judge of probate shall be elected and hold his office for four years, and "until a successor is elected and qualified." In case of vacancy, the Governor is to appoint a person to continue "until a successor is elected and qualified. When elected, such successor shall hold his office the residue of the unexpired term." Article 6, § 14. It was held that Van Valkenburgh, who stood in the place of North, the deceased judge, would hold the office until his successor was elected and qualified, and

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that his term did not expire on the 31st day of December, 1860, and that Lord's appointment was therefore void. And it was also held that it was not a technical vacancy, but a case where a new election was expressly provided for by paragraph 3, § 138, How. Stat., heretofore quoted; that the election in the fall had fallen through by the death of the person elected before the time arrived when he could qualify and take his office; and that the appointment of Lord was made when Van Valkenburgh had an existing title to the office, and therefore void. We can see no distinction between that case and this that at all changes, or militates against, the principle there enunciated. Collins had an existing title to the office of auditor at the time of Leteker's appointment,—a title that could only be extinguished by the *election* and qualification of a successor. Leteker's appointment was therefore void.

It is claimed that the principle laid down in the Lord case is not to be followed in this case, because it is *obiter dictum*, for the reason that a special election had been held, and therefore Andrews was clearly entitled to the office, whether Lord had been legally appointed or not; and an argument is made for the purpose of showing that the construction of the Constitution and statutes in that case by Mr. Justice CAMPBELL was not the proper and legal one. But we think that the construction was correct, and in harmony not only with the Constitution and laws, but with the policy of our State, which from the beginning has inclined most strongly in favor of elections by the people of local officers, as against the appointment of the same by the Governor or the Legislature.

It is also said that we ought not to pass upon the title of Mr. Leteker, because he is not here before us. But the respondent admits that he has been acting under

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the direction of Holihan and Leteker, upon the assumption that Leteker is the lawful incumbent of the office, and Leteker is really the respondent here, the sheriff being only a nominal party.

It is also argued that the relator could not be the chairman, because he was appointed by the Governor in July, 1889, to fill a vacancy occasioned by the death of William C. Mahoney, and he is therefore merely a provisional auditor, without a regular term, and Mr. Holihan, as the next auditor, is legally the chairman. The question whether the Governor could appoint Lawrence to fill the vacancy beyond the next general election after such appointment is not before us in this case, because under his appointment he is auditor at least until his successor is elected and qualified, and he is also by law the chairman of the board, because his term of office soonest expires, such term being considered as the statutory term of the person elected whose place he is filling by appointment.

It follows that Mr. Leteker has no standing as a county auditor, and that Mr. Collins continues in such office until his successor is duly elected and qualified as the law directs. The writ will therefore issue as prayed, with costs against the respondent.

The other Justices concurred

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THE PEOPLE, EX REL. ATTORNEY GENERAL, v. MARSDEN C. BURCH.

Constitutional law—Circuit judge—Vacancy—Appointment by Governor—Election—Legislative journals—Correction of errors —Amendment of bill—Concurrence of other house—Immediate effect.

1. It was the plain intent of the constitutional amendment of 1889, empowering the Legislature to provide for the election of more than one circuit judge in the judicial circuit composed of the county of Kent, to place such additional judge under the provisions of the Constitution and laws of the State applicable to existing circuit judges, and that his term of office should be limited and governed by the Constitution, and that his successor should be chosen at the same time and in the same manner as the other circuit judges.
2. It was competent for the Legislature, at once upon the adoption of the amendment, to create the office of such additional circuit judge, and to prescribe his duties, which office became vacant as soon as created, whether the Legislature so declared or not, and which vacancy the Legislature had the power to authorize the Governor to fill provisionally, by appointment, until the next general election.
3. Act No. 97, Laws of 1889, creating an additional circuit judge in the judicial circuit composed of the county of Kent, and declaring the office vacant, and providing for the filling of such vacancy by appointment by the Governor, *in so far* as it undertakes to fix the term of the appointee, and to declare that it shall not expire until December 31, 1893, is unconstitutional, his constitutional term only extending to the next general election, or until his successor was elected and qualified.
4. Under a resolution of the State Senate dispensing with the reading of the daily journal for the session, and authorizing the secretary to make all necessary corrections in the journal from day to day, he is held authorized to correct an entry which by mistake stated that the vote taken on the passage of a bill was reconsidered, by stating at the close of the journal, and on the page before his certificate, under the head of "*Errata* in the Record of Bills," that the vote reconsidered

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was that by which the Senate had concurred in certain House amendments to the bill, which correction might be so made at any time prior to the final adjournment.

5. In such a case, where it does not affirmatively appear at what time the secretary made the correction, it will be presumed to have been made on or before the date of his certificate, and, if the final adjournment was had on that day, it will also be presumed to have been made before such adjournment, and that it was authorized by the Senate, and that the true journal entry of the proceeding is as corrected by the "*errata*."
6. Where a Senate bill, after having passed that body and been given immediate effect, is amended in the House, and there given immediate effect, a concurrence by the Senate in such amendments must be considered as a concurrence in the order that they take immediate effect, and a separate vote by the Senate that the bill *as amended* take immediate effect is unnecessary.

Quo warranto. Submitted January 8, 1891. Writ dismissed January 23, 1891.

Information in the nature of *quo warranto* to test title of respondent to the office of circuit judge for the county of Kent. The facts are stated in the opinion.

Norris & Norris, for relator.

Butterfield & Keeney and *Taggart, Wolcott & Ganson,* for respondent.

MORSE, J. This is a proceeding in the nature of a *quo warranto*, to test the right of the respondent to hold the office of a judge of the circuit court for the county of Kent.

At the general election in the spring of 1889 an amendment to article 6, § 6, of the Constitution was adopted, providing that the Legislature might provide for the election of more than one circuit judge in the judicial circuit in which the county of Kent is or may be situated. The amendment also provided that it should take effect from the time of its adoption. The Legislature, then being in

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session, thereupon passed Act No. 97, Laws of 1889, creating the office of an additional circuit judge for the seventeenth judicial circuit, composed of the county of Kent, and declared such office vacant from the time the act took effect, and provided that the vacancy thus declared should be filled by appointment by the Governor.

"The person so appointed to hold his office provisionally, from the time of his appointment, until the general election for township officers in the spring of 1893, or until his successor shall be elected; and the term for which said judge shall be appointed shall expire December 31, 1893."

This act was given immediate effect, and was approved by the Governor May 17, 1889. The Governor appointed the respondent as such circuit judge June 1, 1889, and he has since exercised the duties of such office.

The first contention of the relator is that the act was never properly or constitutionally passed by the Legislature. The history of the bill, as far as this question is concerned and necessary to be shown in its consideration, is as follows: The bill was introduced in the Senate February 16, 1889, and referred to the committee on judiciary. May 2, 1889, said committee reported the bill with amendments, and recommended its passage. The rules were suspended, and the bill passed and ordered to take immediate effect. It then went to the House, and was there amended, passed, and given immediate effect. May 3, 1889, the Senate, on its return from the House, concurred in the House amendments, and referred the bill to the committee on engrossment and enrollment. 1 Senate Journal, p. 797. May 7, 1889, the House requested the Senate to return the bill. The Senate thereupon ordered the committee to return it to the Senate, which having been done, the face of the journal as then made up shows the following proceedings:

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"Mr. Wesselius moved to reconsider the vote by which the Senate passed the bill, which motion prevailed. The question being on the passage of the bill, on motion of Mr. Wesselius, the bill was ordered returned to the House." Id. p. 811.

At the close of the Senate journal on the page before the certificate of the secretary, which bears date July 3, 1889, is a page headed—

"Errata in the Record of Bills. (Minor errors are not noted; only such as affect the record of bills in their consideration by the Senate. The corrections are all made upon the authority of the records kept by the bill clerk, under the supervision of the secretary.) * * * On page 811, lines ten and eleven, the vote reconsidered was not the passage of the bill, but the vote by which the Senate concurred in the House amendments to the bill on page 797."

After the proceedings taken as shown on page 811 of the Senate journal, the bill was returned to the House, and there further amended, returned again to the Senate, the House amendments there concurred in, the bill engrossed and enrolled, signed by the proper officers of both Houses, and approved by the Governor.

The defect claimed in the passage of the bill is that the face of the Senate journal shows, on page 811, that the vote by which the Senate passed the bill was reconsidered, leaving it standing before that body as if it had never been passed; that in that shape it was returned to the House, and, when it came back to the Senate, the House amendments were concurred in, but the bill itself was not passed by the Senate, and therefore failed to become a law; that the secretary had no authority to make the correction found in the "*errata*." It does not affirmatively appear at what time the secretary made this correction of the record, but it is to be presumed, from the place where the *errata* is found, that he made it on or before the date of his certificate, July 3, 1889, as the

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certificate follows the correction. The Legislature adjourned *sine die* upon that date, and, as every intendment is to be taken in favor of the correctness of legislative action, it must also be presumed that the correction was made before the adjournment of the Senate. If it was done, as we must presume that it was, before the final adjournment of the Legislature, we must also presume that it was authorized by the Senate, and that the true journal entry of the proceedings is as corrected by the "*errata.*"

It also appears from the journals of the Senate that, on the first day of the session of the Legislature, the following resolution was adopted:

"Resolved that the reading of the daily journal be dispensed with for this session, and that the secretary be authorized to make all necessary corrections in the journal from day to day."

While this may not have been the best practice in order to secure absolute verity of the record, there is no prohibition of such practice to be found in the Constitution, the only provision being that—

"Each House shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy." Article 4, § 10.

Under this resolution, the secretary of the Senate was authorized to make this correction at any time before the final adjournment. We have repeatedly held in this State that it is competent for the courts to go behind the authenticated act, and to examine the journals of the Legislature, to ascertain whether or not the same was constitutionally passed; but where this is permitted the whole current of authority is one way as to the presumption being in favor of the validity of the act. This presumption in favor of the legality of legislative action in the passage of a bill is so strong that it has always

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been held that the evidence found in the journals must be of an affirmative character, and so clear and satisfactory as to be conclusive, in order to overthrow the *prima facie* correctness of legislative action, which attaches to every act which has been duly authenticated by the proper authorities. *Hart v. McElroy*, 72 Mich. 450, and cases there cited. And the record as it appears upon the face of the journal, taken as a whole, without the *errata*, to one at all acquainted with legislative practice, shows clearly enough that the entry upon page 811 is a mistake, and that the "*errata*" is correct. The proper motion to have been made at that stage of the proceedings was, as appears in the *errata*, to reconsider the vote by which the Senate had concurred in the House amendments. Then it could have been properly sent back to the House as it was, and all the subsequent proceedings, as shown by the journal, would have been regular and usual. But if the vote on the passage of the bill had been reconsidered, being a Senate bill originally, it could not have properly been returned to the House. There is no doubt in our minds, from an examination of the whole record, that the correction by the secretary of the Senate sets out the action of the Senate as it was taken at the time, and that the mistake is upon the face of the journal. It follows that the bill was properly passed.

2. It is further contended that the respondent was appointed before the act took effect. It is shown by the journal that the Senate when concurring in the House amendments made no separate order that the bill as amended should take immediate effect. This was not necessary. When the bill was originally passed by the Senate, it was ordered to take immediate effect. The bill as amended by the House was by that body ordered also to take immediate effect. This being originally a Senate

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bill, it was not necessary, after it had once been given immediate effect, and the action of the Senate thereafter was confined to concurrence in the House amendments which had by that branch of the Legislature been ordered to take immediate effect, for the Senate again to order by a separate vote that the bill as amended should take immediate effect. Concurrence in the action of the House as to the amendments must be considered as a concurrence in the order that such amendments take immediate effect. And this has been, we think, the uniform practice of the Legislature in such cases.

3. It is further contended that the Constitution does not authorize the Legislature to provide for the appointment of a circuit judge created under this amendment to the Constitution. The Constitution, Art. 6, § 6, as amended in 1889, provides that—

"The Legislature may provide for the *election* of more than one circuit judge * * * in the judicial circuit in which the county of Kent is or may be situated."

It is argued that this clause, standing alone, does not authorize the *appointment* of a circuit judge, and this may be conceded. But this section does not stand alone. It is now a part of the Constitution, and must be construed with the whole of that instrument. It is evident that the plain intent of this amendment was to put the additional judge of the Kent circuit, authorized to be created, under the Constitution and laws of the State applicable to the circuit judges then in existence, and that his term of office should be limited and governed by the Constitution, and his successor be chosen at the same time and in the same manner as other circuit judges. Article 6, § 20, of the Constitution, provides that—

"The first election of judges of the circuit court shall be held on the first Monday in April, 1851, and every

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sixth year thereafter. Whenever an additional circuit is created, provision shall be made to hold the subsequent election of such additional judges at the regular election herein provided."

The manifest intent of the Constitution is that the judiciary shall be elected, and it would have been more in harmony with the spirit of the Constitution, if not with its letter, if the Legislature in creating this office had provided for the choice of such circuit judge by a special election. In such case, the person chosen would have held the office without question until December 31, 1893, and his successor would not have been chosen until the spring election of that year. We are of the opinion, however, that a special election is not absolutely necessary, and the Legislature may authorize the Governor to make a provisional appointment. Such has been the practice, and there is authority sustaining it, to which we will refer hereafter.

It was competent for the Legislature, at once upon the adoption of this amendment, to create the office of such additional judge, and to prescribe his duties. As soon as the office was created, a vacancy existed whether the Legislature so declared it or not. *Smith v. Askew,* 48 Ark. 87 (2 S. W. Rep. 350), and cases cited. The Constitution provides that—

"The Legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this Constitution." Article 4, § 37.

Also that "when a vacancy occurs in the office of judge of the Supreme, *circuit,* or probate court it shall be filled by appointment of the Governor, which shall continue until a successor is *elected* and qualified. *When elected, such successor shall hold his office the residue of the unexpired term.*" Article 6, § 14.

In this case we find a vacancy existing as soon as the office was created, not only as the legitimate result of

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such creation, but also by express declaration of the Legislature. Act No. 97, Laws of 1889. The Legislature had power to authorize the Governor to fill such vacancy provisionally, until the next general election, or to call a special election. Instead of the special election, the Legislature saw fit in the act creating the office to confer the power of appointment upon the Governor. A similar question was raised in *Attorney General* v. *Weimer*, 59 Mich. 580, 589, where a new county was created. The county officers provided by the Constitution are as clearly made elective officers under that instrument as are circuit judges, yet we held in that case that the Legislature had the power to authorize the Governor to fill the county offices, upon the organization of a new county, provisionally by appointment, to hold until the next general election for such offices. The same principle governs the case at bar.

But, while it was competent for the Legislature to bridge over the time intervening between the adoption of the act and the next general election, by providing for appointment by the Governor, the act, in so far as it undertakes to fix the term of such appointee, and to declare that such term shall not expire until December 31, 1893, is unconstitutional and void. The term of such appointee under the Constitution could not extend beyond the next general election, or until his successor was elected and qualified.

As before said, the manifest intention of that instrument is that the circuit judges shall be elected, and only in case of a vacancy occurring, or the creation of an additional circuit judge in the interim between the general elections, can a circuit judge be appointed by the Governor; and, at the next general election after such appointment, his successor can be and should be elected. In case no election was held, he would, however, con-

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tinue in office until such time as his successor was duly elected and qualified. It is not necessary here to determine whether or not the spring election of 1890 was a general election; but a general election was held November 4, 1890, and any spring election at which Justices of the Supreme Court and Regents of the University are elected is necessarily also a general election, and is now so regarded. *Westinghausen v. People*, 44 Mich. 265. Article 6, § 20, of the Constitution, together with section 6 of the same article, construed with section 14, Art. 6, in relation to the filling of vacancies, make it manifest that it is contemplated that the additional judge shall also be elected, and the only authority for appointment that can be upheld is that of provisionally filling the vacancy caused by the creation of the office until the next general election shall occur.

In *People v. Lord*, 9 Mich. 227, the Constitution is referred to, and it is clearly enough there held that an act of the Legislature providing that, when a vacancy in a county office shall have been filled by appointment of the Governor, the appointee shall hold for the unexpired portion of the regular term, could not constitutionally apply to the office of judge of probate, as it would be in express violation of section 14, Art. 6, which is the same section relating to the filling of vacancies in the office of Supreme and circuit judge. Yet, under this act the respondent's term of office is extended from June 1, 1889, to December 31, 1893, passing two general elections in the fall, and at least two general spring elections, a period of over four and one-half years. If this act can be held valid to this extent, then an additional circuit might be created by the Legislature in the January after the regular spring election of circuit judges, and the Governor authorized to fill the office by appointment for

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five years eleven months or more, thus depriving the people of the right to elect a circuit judge in effect for the full term of six years, in disregard of the plain intent and mandate of the Constitution.

But this excess in the fixing of the term of the Governor's appointee in Act No. 97, Laws of 1889, does not void the whole act or the appointment of the respondent. This part of the act can be treated as a nullity without destroying so much of the act as creates the office and provides for the appointment of an incumbent to fill the vacancy. The respondent was, therefore, legally appointed circuit judge, and is authorized to hold his office until his successor is legally elected and qualified. The information in this case was filed September 10, 1890, and at the time issue was joined the respondent was without doubt legally exercising and holding the office of circuit judge of the Kent circuit. The writ must therefore be dismissed.

On October 4, 1890, Allen C. Adsit applied to this Court for a writ of *mandamus* to compel the Secretary of State to send to the sheriff of Kent county a written notice stating that a vacancy existed in the office of additional circuit judge of Kent county, and that such vacancy would be supplied at the next general election, on November 4, 1890. October 7, 1890, we issued an order to the Secretary of State to show cause why the writ as prayed for should not be granted, returnable October 14, 1890. Upon the last-named day, the Secretary's answer was presented by the Attorney General, denying that any vacancy existed, on two grounds:

1. That the law creating the office (Act No. 97, Laws of 1889) provided that the term of the Governor's appointee should not end until December 31, 1893, or his successor be elected until the April election of the same year; and,—

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2. That the act was never constitutionally passed authorizing such circuit judge to be appointed, setting up the *quo warranto* proceedings, and the same reasons alleged by relator in the case at bar why such act was void.

Upon the hearing of this application for *mandamus*, at first blush it seemed to us that there were grave doubts whether any such office as additional circuit judge of the Kent circuit existed, and it being then too late for the requisite statutory notice to be given, and not wishing to decide so important a question upon a motion for *mandamus*, when proceedings to determine the same matter were pending before us by *quo warranto*, we held that we would not determine the motion then, but hold it until the hearing in this case. Since that time, it is claimed that an election has been held for such office, and that November 4, 1890, Allen C. Adsit was duly elected as successor to the respondent, and an application made by him has been presented to this Court praying for the issue of a writ of *mandamus* to compel the Board of State Canvassers to canvass the votes polled at such election and returned to said board, and to declare said Adsit duly elected circuit judge in the place of respondent, and for the unexpired term ending December 31, 1893. These applications will be disposed of in a separate opinion.

The other Justices concurred.

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ALLEN C. ADSIT v. GILBERT R. OSMUN, SECRETARY OF STATE, AND SAME v. THE BOARD OF STATE CANVASSERS.

[Two cases.]

Elections—Filling vacancy—Failure to give notice—Constitutional law.

1. An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action.
2. While there may be cases where a person will not be punished with costs for not taking action in opposition to a law appearing upon the statute-books before the same is declared unconstitutional, when such costs are in the discretion of the court, yet no rights can be founded upon such a law; nor can any person or persons be deprived of any rights or privileges because such a law has been apparently legally enacted, and appears in the body of our laws.
3. An election to fill a vacancy, of which no notice is given, and which is in fact known to but few of the voters, is void. But though the official notice was not given, or, if given, not in the prescribed form, yet if the election has been held, and the great body of the voters had notice *in fact* of the vacancy, this, coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election, is sufficient, even though many refrained from voting because of a difference of the construction of the law. Mechem, Pub. Off. § 174; *Jones v. Gridley*, 20 Kan. 584; *State v. Skirving*, 19 Neb. 497; *Foster v. Scarff*, 15 Ohio St. 532; *Com. v. Smith*, 132 Mass. 289; *Dishon v. Smith*, 10 Iowa, 212.
4. The question to be considered in these cases is whether the want of the *statutory* notice has resulted in depriving sufficient electors of the opportunity of voting to change the result of the election; and the election should not be set aside when it is apparent that the result would not have been different had all the electors voted.

Mandamus. Submitted October 14, 1890, and January 8, 1891. Granted February 5, 1891.

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Relator applied for *mandamus* to compel the Secretary of State to give notice of an election to fill vacancy in the office of judge of the seventeenth judicial circuit, and subsequently applied for such writ to compel the Board of State Canvassers to meet and examine a certain tabulated statement of votes cast for such office, and determine who is elected thereto. The facts are stated in the opinions.

Allen C. Adsit, relator, in *pro. per.*

B. W. Huston, Attorney General, for respondent Secretary of State.

A. A. Ellis, Attorney General, for respondent Board of State Canvassers.

MORSE, J. In the first case above, the relator moved this Court as soon as possible. His application for *mandamus* shows that on September 4, 1890, he was nominated by the Democratic county convention for the county of Kent for the office of circuit judge to fill a vacancy, and that on September 23, 1890, 25 electors of said county requested the Secretary of State, Gilbert R. Osmun, to give the requisite statutory notice of an election to be held on November 4, 1890, to fill said vacancy in the office of circuit judge. The Supreme Court was in vacation in the month of September, and at the first opening of the Court, October 7, 1890, the relator presented his petition, and an order to show cause was granted. This could not be heard until October 14, 1890, at which time, for reasons stated in *People v. Burch*, *ante*, 408, we decided to hold the decision of the motion until the hearing in *People v. Burch*, which was then pending in this Court. Under the opinion filed in that case, the relator was clearly entitled to his writ, and it was the duty of the Secretary of State to have given

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notice of the election as requested. But, under the circumstances as shown in *People v. Burch*, we should not have granted costs with the writ, as the Secretary of State was not reprehensible in refusing the relator's request in view of the provisions of the law of 1889, and the questions raised as to the legality of its enactment.

We must now consider the most difficult as well as the most vital point, as it affects the relator, in the whole controversy. In the second case above, of *Allen C. Adsit, Relator, v. Board of State Canvassers, Respondents*, it appears that, acting upon the nomination of the Democratic party, and believing that it was competent for the electors at the general election on November 4, 1890, to elect a successor to Judge Burch under the Constitution and laws of this State, steps were taken by the relator to give as general notice of such election, and his candidacy for circuit judge, as possible, in view of the refusal of the Secretary of State and the sheriff of Kent county to give the statutory notices. The relator's name was placed at the head of the Democratic county ticket upon all the Democratic tickets printed by the Secretary of State for said county of Kent; his name for the office of circuit judge of the seventeenth judicial circuit to fill a vacancy being therefore on the *official* ticket of his party in said county. This official ticket was published in the several Democratic newspapers published in said county, including one published in the Holland language; and in such county the fact of his candidacy for said office was published as a matter of news in the Republican and Independent newspapers, and also the claim of the relator upon what ground he was a candidate, to wit, that the appointment of Judge Burch by the Governor could not in law continue beyond the general election of November 4, 1890; and the proceedings of said relator in the Supreme Court, taken before said election, were also published in

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all the newspapers. The relator also caused printed notices, signed by the chairman and secretary of the Democratic county committee, to be posted and circulated in each of the townships and precincts of said county, that an election would be held to supply such vacancy in the office of judge of the seventeenth judicial circuit (Kent county) at the general election to be held on November 4, 1890; and the fact thereby, as it is alleged by relator, that such an election of circuit judge would be held, "became and was notorious in all the election precincts of said circuit."

At said election in said county of Kent, the relater received at every precinct in said county nearly if not the full vote of his party for said office, his total vote in the county being 11,659. The Democratic candidate for Secretary of State received 11,690; Auditor General, 11,699; Member State Board Education, 11,706; State Senator, 11,729; surveyor, 11,693; coroners, 11,695 and 11,693. He received more votes than the following candidates upon his party ticket, to wit, State Treasurer, sheriff, register of deeds, and prosecuting attorney. In the whole county, taking the vote upon surveyor and coroners as a fair index of party strength, he ran about 33 votes behind his ticket. The whole vote on Member of State Board of Education was as follows: Hammond, Democrat, 11,706; Ballou, Republican, 10,061; Scott, Prohibition, 1,601; Powers, Industrial, 85,—total, 23,453. One-half of this would be 11,727, so that the relator received not quite one-half of the full vote of the county cast for the candidates for other offices. But, if the Republicans and Prohibitionists had not supported the same candidate for this office, the relator would undoubtedly have received a plurality of votes, if his vote had not fallen below 11,000; and the probabilities are very strong that if all parties had participated in the election,

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and a full vote had been cast, the relator would have been elected, as every candidate upon his party ticket received pluralities ranging from 2,397 upon Congressman down to 344 for register of deeds, the average of pluralities being over 1,500, and no reason is shown why the relator was not an acceptable candidate to the voters of his own party.

The votes cast for the relator were canvassed by the Kent county board of canvassers, and a tabulated statement of the same forwarded to the Secretary of State, as provided by law. The Board of State Canvassers refused to examine this statement, or to declare the result. The relator asks the writ of *mandamus* out of this Court to compel a meeting of the Board of State Canvassers, and directing them to examine such statement of votes, and to make a statement of the whole number of votes given for said office in said county of Kent at such last general election, and deliver the same to the Secretary of State, with the determination of said board as to what person has been, by the greatest number of votes, duly elected to said office indorsed thereon.

As heretofore shown in *People v. Burch*, and in this opinion, the general election of November 4, 1890, was the proper and legal time for electing a successor to Judge Burch, and to fill the unexpired term ending December 31, 1893. If the Secretary of State had issued the notice prescribed by the statute, there could be no doubt as to the legality of the election of the relator as such successor, and he would now be entitled to the office upon qualifying as the law directs. Was this notice necessary? The statutes provide that—

"When a vacancy shall occur in the office of Judge of the Supreme Court, of judge of the circuit court, * * * 30 days or more before a general election, the Secretary of State shall, at least 20 days before such election,

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cause a written notice to be sent to the sheriff of each of the counties within the election district in which such vacancy may occur, which notice shall state in which office the vacancy occurred, and that such vacancy will be supplied at the next general election." How. Stat. § 146.

The sheriff upon receiving such notice is to cause forthwith a like notice in writing to be delivered to the township clerk in each township, and to one of the inspectors of election in each ward in cities, within his county (Id. § 151), and 20 days' notice of the holding of each general election for the choice of county officers, designating the officers to be chosen at such election (Id. § 152).

The authorities are uniform that the neglect of the Secretary of State, or of the sheriff, or of both of them, to give these notices, would not invalidate an election of persons receiving the highest number of votes for any office for which the regular term was by law to be filled at a general election. *Attorney General v. Canvassers*, 64 Mich. 609; *People v. Hartwell*, 12 Id. 508; *People v. Witherell*, 14 Id. 48; 6 Amer. & Eng. Enc. Law, 298, 299, and cases cited; *State v. Bernier*, 38 N. W. Rep. 369 (Minn.); Cooley, Const. Lim. 603; Mechem, Pub. Off. § 173. The notice in such case required by the statute is deemed directory, and not mandatory. The right and duty to hold the election is derived from the law, and not from the notice. The statute makes the time and occasion of the election imperative. Where such a direction is given, it cannot be made nugatory by any failure to give notice. Every one is bound to take notice of what the statute requires. *Attorney General v. Canvassers*, 64 Mich. 611. But where the time and place of the election are not fixed by law, but the election is only to be called, and the time and place to be fixed, by some authority named in the statute, after the happening of some condition precedent, it has

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been held that it is essential to the validity of such an election that it be called, and the time and place fixed, by the very agency designated by law, and none other. *Stephens v. People,* 89 Ill. 337.

The authorities are not entirely harmonious in regard to the filling of vacancies. It is said, in Mechem on Public Offices and Officers (section 174), that, where the law requires the vacancy to be filled at the next general election, the time and place of which are fixed by law, no notice is necessary, although the law declares that notice shall be given, specifying the vacancy to be filled; an election at the time and place fixed by law will be valid, although no notice was given; citing *People v. Cowles,* 13 N. Y. 350; *People v. Hartwell,* 12 Mich. 508; *Dishon v. Smith,* 10 Iowa, 212; *State v. Orvis,* 20 Wis. 235; *State v. Goetze,* 22 Id. 363; *State v. Jones,* 19 Ind. 356. Judge Cooley, in his work on Constitutional Limitations, page 603, says:

"Where, however, both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from statute, and not from the official notice. It has therefore been frequently held that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given; and such election cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy, or cast their votes to fill it."

There are, however, many cases opposed to this

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doctrine. It is held by these authorities that where there is—

"No notice, either by official proclamation or in fact, and it is obvious that the great body of the electors were misled for want of the official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors,—prevents an actual 'election,' in the primary sense of that word,—and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it be allowed to operate at all, as a surprise and fraud upon the rights of the many." *Foster v. Scarff*, 15 Ohio St. 532.

And in cases where there was no official notice of a vacancy, or that such vacancy would be filled at the general election, and the fact was known to but few of the voters, or there was a doubt as to whether there was a vacancy, and but a small number of the electors voted for any candidate to fill such vacancy, it has been held that the election was invalid. *State v. McKinney*, 25 Wis. 416; *Wood v. Bartling*, 16 Kan. 109; *State v. Good*, 41 N. J. Law, 296; *Beal v. Morton*, 18 Ind. 346; *People v. Crissey*, 91 N. Y. 616; *Toney v. Harris*, 85 Ky. 453 (3 S. W. Rep. 614); *Secord v. Foutch*, 44 Mich. 89.

I think the true doctrine is as laid down in the text of Mechem on Public Offices and Officers, at pages 108, 109, § 174, that an election to fill a vacancy of which no notice was given, and which was in fact known to but few of the voters, is void. But though the official notice was not given, or, if given, not in the prescribed form, yet if the election has been held, and the great body of the voters had notice *in fact* of the vacancy, this, coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election, is sufficient, even though many refrained from voting because of a difference of the construction of the law. See, also, *Jones v. Gridley*, 20 Kan. 584; *State v. Skirving*,

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19 Neb. 497 (27 N. W. Rep. 723); *Foster v. Scarff*, 15 Ohio St. 532; *Com. v. Smith*, 132 Mass. 289; *Dishon v. Smith*, 10 Iowa, 212. The question to be considered in these cases is whether the want of the statutory notice has resulted in depriving sufficient electors of the opportunity to exercise their franchise to change the result of the election; and the election should not be set aside when it is apparent that the result would not have been different had all the electors voted.

In the case before us it is evident that all the electors in the county of Kent had nearly, if not quite, as full notice that an election for circuit judge was to take place as if such notice had come through the official statutory notices. It was notorious that the relator was a candidate; that his party had nominated and were supporting him for this office, claiming that, under the Constitution and laws of this State, a vacancy had occurred in this office, which was required to be filled at the election on November 4, 1890. The newspapers were full of his candidacy, and of his attempts to obtain official notice of the election. Every Democratic ticket bore his name for the office, printed by authority. Notices of the election were posted in every voting precinct, unofficial, it is true, but yet bringing the fact home to the electors that a large portion of the electors, comprising one of the principal political parties in the county, were insisting that a vacancy had occurred in the office of such circuit judge; that the law required such vacancy to be filled at that election; and that they were supporting the relator as a candidate for such office. It is not to be inferred from the circumstances surrounding and leading up to this election that any considerable number of the electors of the county of Kent were unaware of the candidacy of relator, or that an election was being held to fill an alleged vacancy in the office of circuit judge. On the

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contrary, it clearly appears that the other political parties, and the voters of such parties, refrained from taking part in such election under the belief that no vacancy existed, and that Act No. 97, Laws of 1889, extending the term of the respondent until December 31, 1893, was constitutional and valid.

Upon the presentation and argument of this application for *mandamus*, I was strongly impressed with the idea that such electors were justified in relying upon a statute of the State, which had not been declared invalid, and in refraining from voting for a candidate for this office, and that therefore the election could not be a legal one without the official notice provided by the statute. But on consideration, and a review of the authorities, I have arrived at a different conclusion.

An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action. The maxim that all men are presumed to know the law must prevail. And, while there may be cases where a person will not be punished with costs for not taking action in opposition to a law appearing upon the statute-books before the same is declared unconstitutional, when such costs are in the discretion of the court, yet no rights can be founded upon such a law; nor can any person or persons be deprived of any rights or privileges because such a law has been apparently legally enacted, and appears in the body of our laws. If, in the present case, but few had voted, and it appeared that the fact of the existence of a vacancy, or that this election was the proper and legal time to fill it, was known to but a small portion of the electors, so that holding the election valid would seem to be a disfranchisement of a large majority of the electors, I should, under the rule heretofore quoted from Mechem on Public Offices and Officers, be constrained to hold that no legal election had occurred

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for this office. And this, I think, would be in accordance with the ruling of this Court in *Secord v. Foutch*, 44 Mich. 91, where Judge CAMPBELL says:

"In the present case it is entirely clear that there could have been no general idea that there was to be an election for judge of probate, for there were no opposition candidates, and the number of votes cast is conclusive of the general understanding. * * * It is a necessary safeguard to popular elections that the people be informed what officers they are to vote for. They may be expected to know what elections are to be made at the regular general elections, and as to those in ordinary cases it might be dangerous to allow a failure to give notice to avoid the election. This would enable the popular will to be defeated by the misconduct of ministerial officers. But there can be no such knowledge assumed concerning vacancies in office, *and, without some distinct and public notice of some sort,* such an election could hardly fail to be capable of the worst kind of fraud and trickery."

But this is not such a case, and seems to me to be governed by the case of *People v. Hartwell*, 12 Mich. 508. The Constitution and our laws plainly provide that a vacancy existed in this office, and that the election of November 4, 1890, was the proper time to fill it. The Secretary of State gave notice as he ought to have done of an election at that date of a justice of the Supreme Court to fill vacancy, and no one will contend that if he had failed to do so it would have invalidated the election, providing a candidate had been nominated and voted for by a plurality of the people, considered in reference to the relative strength of the four political parties in this State. In other words, the Secretary of State, a ministerial officer, could not have prevented the election of a Justice of the Supreme Court by failing to give the notice required by the statute, and it would have been entirely immaterial upon what ground he based his refusal to issue such notice. The same section and article

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of the Constitution that governs in the case of election to fill a vacancy in the office of Justice of the Supreme Court also expressly regulates and controls the election to fill a vacancy in the office of circuit judge. Article 6, § 14. And by necessary implication this section has been held to preclude the appointment by the Governor to fill a vacancy in either of these offices beyond the next general election. The successor to such appointee, when elected, could not "hold his office for the residue of the unexpired term," if the Governor could by appointment fill the vacancy for the unexpired term regardless of intervening general elections. *People v. Lord*, 9 Mich. 227; *People v. Burch, ante*, 408. Neither can the Secretary of State, by refusing notice, nor a minority party, by refusing to nominate a candidate or to vote, prevent the holding of an election, when the Constitution is plain that it should be held.

The reason why the notice is not given, or why those not voting abstain from exercising their privileges as electors, is unimportant, except as it may go to the question whether or not there was such a public notice of the election as to bring home to the majority of the electors the fact that such an election was being held. Otherwise it would be in the power of a purely ministerial officer, in concert with a minority party, to assume either that a law was constitutional or unconstitutional, as the case might be, to suit their purposes, and thereby, by neglecting to give notice and refusing to vote, to defeat the will of the majority, and keep an office filled by one who the law declares should have a successor elected by the will of the majority, or, in this State, the plurality, of the people. This cannot be permitted, as is clearly shown in *People v. Hartwell*, 12 Mich. at page 523.

It follows that the relator is entitled to the office of

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circuit judge of the county of Kent, in the place and stead and as the successor of Marsden C. Burch, the present incumbent, and that the writ of *mandamus* should issue as prayed in the case of *Allen C. Adsit, Relator, v. State Board of Canvassers, Respondents.*

CHAMPLIN, C. J., and MCGRATH, J., concurred with MORSE, J.

LONG, J. I concur in the result reached by my Brother MORSE in this case, but I do not agree with him in some of the reasons given by which he reached the conclusion that the relator is duly elected to the office of circuit judge of Kent county.

It is true that the authorities are uniform in holding that the neglect of the Secretary of State, or of the sheriff, or both, to give notice, would not invalidate an election of persons receiving the highest number of votes for any office for which the regular term was by law to be filled at a general election. But where the time and place of the election are not fixed by the law, and the election is only to be called, and the time and place to be fixed, by some authority named in the statute, after the happening of some condition precedent, it is held that it is essential to the validity of such an election that it be called, and the time and place fixed, by the very agency designated by the statute, and none other. *Stephens v. People,* 89 Ill. 337. I should rest my conclusions upon this doctrine, and hold the relator not duly elected to the office of circuit judge, were there not certain facts patent in this particular case which should bring it out of that rule, and from which I am satisfied that the electors of Kent county have not in any manner been defrauded. The statute itself provides that the Governor may appoint to fill the vacancy until the spring election of 1893. This was passed by the Legislature and

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approved by the Governor. Acting under the authority so conferred, the Governor made the appointment to the full end of the term, thus giving construction to the statute that it did so confer upon him the power to make the appointment for the full period of time. No one questioned this right, so far as appears by this record, until just before the fall election of 1890. The Secretary of State was called upon in September, 1890, to give notice of this election, and for the first time the question was agitated as to the power of the Governor to make the appointment for the full time. This was, however, settled by the Secretary of State, the head of one of the State departments, giving construction to the statute as it had before that time been construed by the Legislature and the Governor. The relator then came to this Court for *mandamus* to compel the Secretary of State to give the notice, the claim being made that the Governor had no power to appoint beyond the next general election. We withheld our opinion upon the questions raised in that proceeding, for the reason that we were uncertain whether the act creating an additional judge in that circuit had properly passed both branches of the Legislature. Upon a full argument of that question, we have disposed of that part of the case in *People v. Burch*, *ante*, 408, at the present term of this Court.

The relator, having been nominated by his party in Kent county, and having done all in his power to procure the publication of notice by the proper authorities that an election would be held for circuit judge in that county, himself procured to be published the following notice:

"ELECTION NOTICE.

"*To the Electors of the 17th Judicial Circuit:*

"WHEREAS, by Act No. 97, Public Acts of 1889, the

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office of additional judge for the 17th judicial circuit was created, and it was further provided that said office should be vacant from the time said act should take effect, which was May 17, 1889, and authorized the Governor to fill said vacancy by appointment for the unexpired term, ending December 31, 1893; and

"WHEREAS, the Governor appointed Hon. Marsden C. Burch to fill the vacancy so created by said act, who now holds said office by virtue of said appointment; and

"WHEREAS, it is provided by the Constitution of the State of Michigan, section 14, article 6, that 'when a vacancy occurs in the office of judge of the * * * circuit * * * court, it shall be filled by appointment of the Governor, which shall continue until a successor is elected and qualified; *when elected, such successor shall hold his office for the residue of the unexpired term*'; and

"WHEREAS, the Secretary of State, whose duty it is to give notice of such election, has been requested to give the same, and refused to do so:

"Now, therefore, the undersigned hereby give notice that a vacancy in the office of judge of the 17th judicial circuit exists, which should be supplied at the next general election to be held in the State of Michigan on the 4th day of November, 1890, and, notwithstanding the refusal of the Secretary of State to give notice thereof, an election will be held on said 4th day of November, 1890, in said 17th judicial circuit, to supply said vacancy.

"*Dated, Grand Rapids, Mich., October* 28, 1890.

"L. E. CARROLL,

"Chairman Dem. County Committee.

"JOHN J. BELKNAP, Secretary."

These notices were posted in all the townships, wards, and voting precincts in said county some time prior to the day of election. They were signed by the chairman and secretary of the Democratic county committee, and the proclamation was thus made that it was claimed that a vacancy existed in the office of circuit judge in that county, and the voters were called upon to vote for a candidate to fill the office. It appears also that the matter was canvassed by the county papers, and appar-

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ently as great publicity was given to the fact as any notice which the Secretary of State or the sheriff might have given; but the notice was not official, and the other political parties in that county, from the fact that they made no nominations for that office, presumably regarded the office as one already filled under the law, and that no vacancy existed to be filled at that election. The law upon its face, and the action of the Governor, in making the appointment of Judge Burch under it, undoubtedly led the other political parties to believe that no such vacancy existed, and, therefore, no nominations need be made for that place. The other political parties had full tickets in the field except for this office. They looked upon the face of the law, and interpreted it from its reading, and from the action of the Governor and Secretary of State, instead of a comparison with the Constitution.

It is said, however, that all parties must be presumed to know that the law was unconstitutional in so far as it attempted to confer upon the Governor the power to appoint beyond the next general election; that an unconstitutional law is no law; and that, by the plain terms of the Constitution, the people were advised that a vacancy existed at the first general election after the appointment was made. There would be much force in this proposition if an attempt were made to uphold an act done or right claimed to have been acquired under the unconstitutional law, for the reason that every one who is competent to act for himself is presumed to know the law, and ignorance of the law is no excuse or justification. But the very ground upon which the notice becomes necessary to a valid election is that the law does not fix the time or place when the election is to be held, and the provision of the Constitution upon which the action is based does not so fix and determine it. If there were

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no other considerations in the case, I should unhesitatingly hold that the election was absolutely void, as a fraud upon the electors of that county; that one party could not put a candidate in nomination for such an important office on the claim that a vacancy existed when no such vacancy appeared upon the face of the statute, and without any published notice from the public officers whose duty it is under the statute to give such notice, and, upon a few votes being cast in favor of that candidate, have him foisted upon the people as the one legally entitled to all the privileges and emoluments of the place.

But there are other considerations which must have weight in determining whether the people have been defrauded. These notices were not only posted by Mr. Adsit and discussed by the newspapers throughout the county, being notice of the claim made to the voters, but the Democratic ticket was printed under the authority of the Secretary of State, containing the name of Allen C. Adsit as a candidate for the office of circuit judge of the seventeenth judicial circuit. These tickets were placed at every polling place in the county. At the close of the election these votes were counted by the inspectors of election, and returned to the board of county canvassers. From this tabulation it appears that the whole number of votes cast in that county for the office of Governor was 23,384, and for the general State officers, 23,435, thus showing the number of electors of all political parties appearing and voting at that election to have been at the utmost 23,435, as the tabulated statement of the votes cast for the various county officers shows about the same vote. From the tabulated statement it also appears that the relator had votes cast for him for that office about equal to any candidate running upon the Democratic ticket from Governor to county surveyor, who

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had pluralities ranging from 344 to 2,397, and nearly every candidate on the Democratic ticket received pluralities of over 1,600. The relator received for the office of circuit judge 11,659 votes; the Democratic candidate for Governor received 11,833; the Democratic candidates for the various State offices received from 11,519 to 11,781 votes each; and the Democratic candidates for the various county offices received from 11,062 to 11,935 votes. It is therefore fair to presume that, had the other three political parties made nominations for this office, the vote cast thereon would not have been to exceed the highest vote cast by each of such parties for the other candidates, thus giving to the relator a plurality of all the votes cast for that office of from 1,600 to 2,000. There were three other regular tickets in the field. The highest vote given for any Republican candidate on the State ticket in that county was 10,231. The average vote for all candidates, however, was about 10,100. The highest vote given for any candidate on the Prohibition State ticket was 1,694, the average being about 1,600. The highest vote given for any candidate on the Industrial State ticket was 86, that being about the average. The highest vote given for any candidate on the Democratic State ticket was 11,833, the average being about 11,700.

It would not be contended by any one, however partisan, that had all the political parties made nominations for that office, and presented their tickets with the names of candidates for that office printed thereon, it would, under such circumstances, be the duty of the Court to declare the election void for the want of the statutory notice, as the only function of the statutory notice is to give publicity to the fact from official sources that an election is to be held, so that a fair election may be had, and that the will of the electors may not be

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defeated. Under the statutes of this State, those, and those only, who receive the greatest number of votes cast for any office are entitled to such office. It is idle to indulge in presumptions which the facts do not warrant; but, taking the facts here shown, the mind is led inevitably to the conclusion that, had the other political parties named candidates for that office, the result must have been that Mr. Adsit would have been elected by a plurality of over 1,600. It appears to me that the will of the electors of Kent county would be defeated under these circumstances to hold the election of the relator void. He had done all that could be done to have the statutory notice given. Failing in this, he took steps to give such notice as was possible to all the electors of the county that such election would be held. This, as has been seen, would have been wholly ineffectual, did it not appear that the necessary vote was actually cast to give him the greatest number of votes had other candidates been presented. It seems to me that any other ruling would be contrary to common sense, and an injustice not only to the relator, but to the people of Kent county, and cast upon the people there the burden of another election.

For these reasons I concur in the result.

GRANT, J., (*dissenting*). I cannot concur with my brethren in the conclusion reached by them in these cases. I do not think that there was an election for the office of circuit judge in Kent county at the last November election, within the spirit and meaning of our Constitution and laws.

It is undoubtedly the law that where the election is a general one, and the officers are to be elected for the full and regular term, the failure to give notice will not avoid the election. This is the well-recognized rule of

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nearly all the authorities. But when vacancies are to be filled, and no notice of the election has been given, the authorities are divided, and, as a rule, each case seems to have been decided upon its own peculiar facts. It may be safe to say that the leading idea in these cases is that where it is evident there has been a fair expression of the popular will, and a general understanding that there was a vacancy, and that an election was to be held to fill it, the elections have been held valid, otherwise void. In the case at bar, there could have been no general understanding that there was a vacancy to be filled. No such understanding can, in my judgment, exist where the statute law upon its face expressly says there is no vacancy, and where a suit is pending in a court of last resort to test a question. Under these circumstances it cannot be so plain a question that courts have the right to say that there was such a general understanding of a vacancy to be filled as to dispense with notice by the proper authorities.

The case mainly relied upon in this State to sustain relator's position is the case of *People v. Hartwell*, 12 Mich. 508, but the facts in that case are so widely different from the one at bar as in my judgment to render it no authority here, and to render the principles there laid down entirely inapplicable to this case. In that case there was a vacancy in the office of city attorney, who was elected, and under the law was to hold his office for two years. The charter expressly provided, in case of vacancy in that office, that the common council were authorized to appoint and fill the vacancy until the next annual election. The incumbent had removed from the city, and the common council, by resolution, declared a vacancy in the office, and that resolution was published in the official paper of the city. By the same resolution declaring a vacancy, the respondent was appointed to fill

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it until a general election. There was, therefore, in that case, an actual vacancy, not only by the express terms of the charter itself, but by the solemn declaration of the council, the governing body of the city, which declaration was published in its proceedings. That was a general election, and the Court say:

"Electors are supposed to know what officers are to be elected at a general election, and if in doubt can readily inform themselves."

Of course any voter could in that case very readily have determined for himself the question, and would have found that there was a vacancy, and that the statute law expressly provided that it should be filled at the then coming election. If a voter, in the case at bar, had attempted to ascertain whether or not there was a vacancy, what would he have found to enlighten him and to guide him in his investigation to a conclusion? He would have found a law providing for an additional circuit judge for the seventeenth judicial circuit, expressly declaring a vacancy in the office, and authorizing the Governor to fill it by appointment until the general election of 1893, which was the time for the next general election for circuit judges after the law was enacted. Examining further, he would have found that this law was unanimously passed by both the Senate and House of Representatives; that it was approved by the Governor; that the Governor had filled the vacancy by appointment; that on October 7, 1890, the law department of the State had commenced proceedings in this Court to test the validity of the entire act, claiming that it was not constitutionally passed; that the Secretary of State had previously declined to find that there was a vacancy, and to issue a notice of election to fill it; that on the same day the relator had filed his petition in this Court to compel the Secretary of State to issue a notice of election;

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that on October 14 this Court announced that it would not then decide the question, that there was not sufficient time for notice to be then given according to law, and that further time for consideration would be taken as to the constitutionality of the law. *He would further have found that there had been no judicial or official intimation whatever that a vacancy existed.* Under those circumstances, can it be said that there was a general knowledge that there was a vacancy, and that an election could legally be held?

I do not think the people are called upon to determine constitutional questions of this character. The presumption is always in favor of the constitutionality of a law, and that presumption exists until the courts have declared it otherwise. No one would seriously contend that the Secretary of State should assume the function of declaring such a law unconstitutional, and act accordingly. He did what was clearly his duty to do in acting upon the assumption of its constitutionality, and leaving other parties to take the proper steps to test it.

Three out of the four political parties in the field made no nomination for that office, evidently assuming that the law was constitutional, and that there was no vacancy. One party nominated relator, who received a very large number of votes. Had there been knowledge of a vacancy and notice of an election, or had there been official notice of the election, the other political parties would undoubtedly have made nominations for the office. Had they done so, it is entirely problematical whether relator would have received a plurality of the votes cast. I do not think it is the province of this Court to say that such would have been the result, and the relator would have been elected in any event. Had there been any other candidate in the field for whom votes were cast, the conclusion of my brethren in this respect might

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be natural; but when three out of four political parties have chosen to recognize an express provision of law as valid and constitutional, and have refrained from acting until the Court, the proper tribunal, have decided the question, I cannot hold the election to be valid, where, in the absence of all official notice, but one man has been voted for, and but one man was in the field. Upon what principle can we assume that he would have been elected if the other political parties had nominated one or more candidates? It is true that the relator's political party had a very large plurality, but can we say it was so large that the electors would in any event have elected him to the office of circuit judge, if the other parties had united upon one candidate, or had each nominated a separate one? We might speculate upon the result, but speculation is not the province of this Court. Unless we can say *with certainty* that the result would not have been different, we have no right, in my judgment, to sustain the election upon the ground that the will of the people has been expressed. Relator did not receive one-half of the votes cast. We cannot tell whether in case of opposition he would have received all his present vote, nor whether he would have been opposed by one or more candidates. No one can say more than that it is probable he would have been elected; but is that enough to sustain an election otherwise void? Such an election cannot be called an expression of the popular will, and is not in accord with the spirit and genius of republican government.

The questions of the constitutionality of the act were grave and important. Members of the legal profession differed upon them, and no one could have foreseen what the decision of this Court would be. I do not think an election under those circumstances can be sustained as valid. Under such conditions, an election can only be

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sustained when there has been a general belief and acquiescence on the part of the people that it was unconstitutional, that a vacancy existed, and that an election was to be held to fill it, and where there has been a general participation in the election. I do not think a single authority can be found sustaining an election as valid under the facts of this case, or any similar to them, nor do I think that the principles laid down by any of the authorities will sustain it.

This case is, in my judgment, clearly within the reasoning of this Court in *Secord v. Foutch*, 44 Mich. 91, where it is said:

"It is a necessary safeguard to popular elections that the people be informed what officers they are to vote for. They may be expected to know what elections are to be made at the regular general elections, and as to those in ordinary cases it might be dangerous to allow a failure to give notice to avoid the election. * * * But there can be no such knowledge assumed concerning vacancies in office, and, without some distinct and public notice of some sort, such an election could hardly fail to be capable of the worst kind of fraud and trickery."

It is not enough that one man or one party assume to give notice that they will vote for a man for an office. This is no evidence of a vacancy, and in this case had no bearing whatever upon the question of vacancy. If there was a general knowledge that there was a vacancy, and that there would be an election to fill it, it is of no legal consequence whether a minority or majority party nominate a candidate, nor whether he receives few or many votes. When it is understood and known that an office is to be filled by election at the election to be held, it is of no consequence whatever whether there be one or many candidates, or whether there be few or many votes cast. The electors have then had ample opportunity to exercise their rights, and are foreclosed by the result.

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The relator cites *People v. Cowles*, 13 N. Y. 350. The force of that as an authority is weakened by the fact that the conclusion was reached by a divided court of five to three, but the rule there adopted by a majority of the court can safely be adopted in this case, without in the least affecting the question. One of the justices of the supreme court died October 23, previous to the general election of the judges on the ensuing 6th of November. No notice was given of the election. The time within which the Secretary of State should have given notice had elapsed before October 23. The party conventions had been held and nominations made. After the death of the justice, the conventions reassembled, and each nominated a man to fill the vacancy. Fifty thousand votes were cast. No question was raised as to the fairness of the election, which was generally participated in by the people. The sole point in issue was whether the election was invalid for the reason that no official notice had been given, and a vacancy had occurred after the time had expired within which notice could have been given. I call attention to the reasoning of the dissenting opinion, and quote with approval the following:

"Notice to the electors lies at the foundation of any popular elective system. The elector cannot act through the ballot without notice that a vacancy exists to be filled. Necessity and sound policy demand that every elector shall have both the knowledge and the opportunity to enable him to exercise the elective right deliberately and intelligently. In our elective system the duty of giving notice is devolved upon the secretary of state. The legislature have wisely provided that the notice shall be given by this officer within a time, and in a way, calculated to give the fullest notice to the electors. It may be that, under this statute regulation, the omission to give the required notice of an election of a judge for a regular term would or ought not to vitiate the election. The elector should be presumed to know the law, and consequently at what period the regular

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term of the public officers to be voted for will expire, and be prepared to act accordingly; but there can be no such presumption when the election is to fill a vacancy. I believe that no case can be found holding that notice to the electors of the existence of a vacancy, and calling on them to fill it, is not essential to give validity to the meeting of the electoral body to discharge the special duty. Certainly it could rest on no principle or sound rule of governmental policy. In the nature of things, notice to the elector that a vacancy exists, and calling on him to fill it, is an essential characteristic of a popular election; and public policy and safety require that it should be given in such form as to reach every elector who has the duty to discharge. Notice, therefore, being an essential element of an election to fill a vacancy, whether we regard the election at which the relator claims to have received a plurality of votes held in pursuance of the constitution or the law, it was equally invalid."

In the absence of the statutory notice required to be given, it must be conceded that something must exist as its equivalent. That something in this case must be—

1. The public assertion of the relator and his friends; and—
2. The action of the convention of his party in placing him in nomination, and the publication thereof in the newspapers of the circuit.

I can find no authority to sustain the position that the existence of either one or both of these constitutes such knowledge of a vacancy and notice of an election as must compel electors to take notice of them, and especially where the fact of a vacancy depends upon a construction of the Constitution. They are unofficial acts, binding upon no one. Under the theory of the relator, the convention of one political party can compel the people at large to adopt at their peril the construction of the Constitution and laws governing elections which the members of that convention see fit to place upon them. The people have a right to rest and act upon the constitu-

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tionality of such laws until the courts have declared them void. Any rule that will disfranchise those who have so acted is, in my judgment, unsound in policy, unsupported by authority, and not the law. When the people generally have acted upon and acquiesced in a belief in the unconstitutionality of the act by participating generally in the election, then, and then only, may the election be held valid. No such claim can be successfully maintained in this case, unless we are prepared to hold that the action of a convention of one party represents the people and is binding upon them. Does such an election satisfy the theory of popular elections where the members of three out of four political parties, and more than half of the electors, have refrained from making nominations, and from voting, in the honest and reasonable belief that no vacancy exists?

The most careful investigation I have been able to make leads me to the following conclusions:

1. Where the statute law creates a new or additional office, and by its terms declares the office vacant, and provides for filling it by appointment until the next election at which officers for full terms are to be elected, and the office is so filled, and there is no official notice of a vacancy or of an election to fill it, there is no such knowledge of a vacancy among the people as will justify an election in the absence of a general participation in it by the people.

2. When a suit is pending in the proper court to test the validity of the act and the question of a vacancy, the people cannot be held to knowledge of a vacancy until after the decision of the court.

3. A nomination by only one political party of four, and the fact that the members of that party generally voted for the nominee, are not a general participation by the people in the election, nor a general acquiescence in

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the belief that there is a vacancy, notwithstanding the fact that such political party had a plurality of the votes cast.

4. Such an election cannot be held to have expressed that deliberate will and choice of the people necessary to sustain popular elections.

5. The relator was not, therefore, elected. No injustice or inconvenience can result from a denial of the writ. An election for this office can be held at the coming spring election, about two months hence, when the people can have a full and fair opportunity to nominate candidates, and elect a man of their choice.

The writ should be denied.

P. T. GLASSMIRE v. J. BYRON JUDKINS, CIRCUIT JUDGE OF MANISTEE COUNTY.

Criminal law—Libel and slander—Construction of statutes.

1. Prior to the passage of Act No. 192, Laws of 1879 (How. Stat. § 9315), the statutes contained no express provision for the punishment of libel and slander, but they were punishable as misdemeanors at the common law, under How. Stat. § 9261.
2. It was the evident intention of the Legislature in enacting Act No. 192, Laws of 1879 (How. Stat. § 9315[1]), to exclude from its operation non-enumerated cases of libel and slander known to the common law, namely, where one is held up to contempt and ridicule, and possibly where one may be charged with having a loathsome disease.

Mandamus. Submitted January 20, 1891. Denied February 5, 1891.

[1]Amended by Act No. 210, Laws of 1885 (3 How. Stat. p. 3816), and a new section added.

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Relator applied for *mandamus* to compel respondent to vacate an order quashing an information for criminal libel. The facts are stated in the opinion.

P. T. Glassmire, relator, in *pro. per.*

Smurthwaite & Higgins, for respondent.

GRANT, J. This is an application for the writ of *mandamus* to compel the respondent to vacate an order of the court quashing an information against one John P. O'Malley.

Complaint was made against O'Malley before a justice of the peace charging him with a criminal libel not enumerated in How. Stat. § 9315. O'Malley was bound over to the circuit court by the justice, and the relator filed the information here in question. The respondent moved to quash the information and for his discharge for the reasons—

1. That said court had no jurisdiction to try said offense, as it was, if an offense at all, one triable in justice's court.
2. That no offense known to the laws of this State was charged in said information, as the necessary facts were not alleged to bring the said publication within the provision of the criminal libel statutes of this State.

Libels of the kind here complained of were indictable at the common law. Prior to the act of 1879, hereinafter referred to, the statute contained no express provision for the punishment of libel and slander. They were therefore punishable as misdemeanors at the common law, under How. Stat. § 9261, which reads as follows:

"Every person who shall be convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment."

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In 1879 the Legislature passed "An act to provide a punishment for libel and slander." Act No. 192, Laws of 1879. This act provided that—

"Any person who shall falsely and maliciously, by word, writing, sign, or otherwise, accuse or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, or impute to any female a want of chastity, shall be deemed guilty of a misdemeanor, and on conviction * * * shall be punished by a fine not exceeding one hundred dollars, or imprisonment * * * not exceeding ninety days, or both, * * * in the discretion of the court."

It is insisted by the relator that the criminal matter alleged was not included within the statute, but was a common-law criminal libel, punishable under section 9261, above referred to. We think the ruling of the circuit judge was correct. It was the evident intention of the Legislature in enacting this law to exclude other cases of libel and slander known to the common law, but not enumerated in the statute. The very title of the act shows this to be the intention. The cases not enumerated in the statute are those where one is held up to contempt and ridicule, and possibly where one may be charged with having a loathsome disease. It certainly could not have been the intention of the Legislature to impose a light penalty for the graver offenses, and leave the heavier penalties to stand against the lighter offenses which were known to the common law.

The writ must be denied.

The other Justices concurred.

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FRANK HESTER v. THE COMMISSIONERS OF PARKS AND BOULEVARDS OF THE CITY OF DETROIT.

Costs—Condemnation proceedings—Detroit park and boulevard act.

1. Costs are only recoverable when there is statutory authority awarding them.
2. There is no statutory authority for awarding either witness or attorney fees in condemnation proceedings under Act No. 388, Local Acts of 1889, relating to parks and boulevards in the city of Detroit.

Mandamus. Submitted January 21, 1891. Denied February 5, 1891.

Relator applied for *mandamus* to compel payment of costs in proceedings relating to widening of boulevard. The facts are stated in the opinion.

E. T. Wood, for relator.

John J. Speed, for respondents.

MCGRATH, J. Proceedings were instituted by respondents, under an act relating to parks and boulevards in the city of Detroit (Local Acts of 1889, p. 607), to widen the boulevard, taking a strip from relator's property. These proceedings were afterwards discontinued, whereupon relator's costs were taxed at $30.50, including an attorney fee of $25, and witness fees. Respondents refuse to pay these costs, and a *mandamus* is prayed to compel the payment.

Costs are only recoverable when there is statutory authority awarding them. *Booth v. McQueen*, 1 Doug. 41; *Jeffery v. Hursh*, 58 Mich. 258; *Tolford v. Church*, 66 Id.

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431. The only provision relating to costs or fees in the act referred to, under which these proceedings were had, is section 27, which is as follows:

"Jurors in said proceedings, and all officers who shall render any services in said proceedings, shall be entitled to the same fees which are allowed for like purposes in ordinary cases of opening streets and alleys in said city, commenced in said recorder's court; and the persons appointed to represent absent or other respondents, as above provided, shall be paid such sum as the court may deem reasonable."

The act relating to opening streets and alleys in the city of Detroit (Local Acts of 1885, p. 346, § 22) provides for the payment of "officers', jurors', and witnesses'" fees; and the general law for the opening of streets and alleys in cities and villages (How. Stat. p. 1300*a*, § 17) contains the same provisions as the local act. The general law, however, contains (section 19, as amended in 1889) a separate section providing for the allowance by the court of an attorney fee. Neither the provisions of the local street opening act nor the general law relating to street openings have any application to proceedings had under the park and boulevard act. The presence of the provision in the latter act for payment to persons appointed (by the court) to represent absent or other respondents, and of the separate provision in the general law providing for the payment of attorney fees, make it very clear that attorneys are not included in the term "officers."

There is therefore no statutory authority for awarding either witness fees or attorney fees in proceedings under this act, and the application must be denied.

The other Justices concurred.

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THE GUTTA PERCHA & RUBBER MANUFACTURING COMPANY (A CORPORATION) v. CHARLES H. WOOD AND WILLIAM A. ATWOOD.

Sale—Warranty—Failure of consideration—Set-off—Error without prejudice.

1. In this case it is held that if the defendants purchased from the plaintiff rubber belting for sale in their business with an express or implied warranty of quality, which, owing to the situation of the belting, could not be determined by inspection before trial, and paid for it before ascertaining that it was worthless, which it proved to be on such trial, they would have a right to recover back the purchase price, or set it off in an action of *assumpsit* brought by the plaintiff to recover a money demand due from the defendants; and that the burden of proof would be upon the defendants to show the breach of warranty, and that the belting was absolutely worthless for any purpose, if not returned or tendered to the plaintiff.
2. The charge in this case (see opinion), except in so far as it instructs the jury that if the belting was of some value they should find that value, and deduct it from the amount of the defendants' claim, is sustained by *Petersen v. Lumber Co.*, 51 Mich. 86; and, as the jury found the full amount of defendants' claim, the error in such exception was without prejudice.

Error to Genesee. (Newton, J.) Argued January 6, 1891. Decided February 6, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Howard & Gold, for appellant, contended:

1. The court erred in modifying plaintiff's first request by adding the words "unless you find a set-off in favor of the defendants," because the damages claimed by defendants and sought to be set off were unliquidated, and fall within the principle laid down in *Mitchell v. Shuert*, 16 Mich. 444; *Carter v. Joseph*, 48 Id. 615.

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2. The court erred in admitting in evidence the invoice of belting of date August 11, 1885. Upon its face it is plain that it could not have been the invoice sent pursuant to defendants' letter of July 30, 1885, for the belting is with one exception of different quantities from those ordered in said letter, and the invoice contains one item not so ordered; hence it did not tend to prove a warranty, but to mislead the jury.

3. The court erred in instructing the jury that if they found "the goods of some value, and not returned, if they were worth returning, then the purchaser would be entitled to recover the difference in value between the price he paid for them and the market value of the articles at the time he received them," said instruction being contrary to the law as laid down in *Mitchell v. Shuert*, 16 Mich. 444; *Carter v. Joseph*, 48 Id. 615.

4. The defendants settled the question whether the goods were worth returning by sending back the portion used up in threshing service,—which their witnesses and customers Huthinson and Munger testify was of value for that service,—and by retaining the remainder with full knowledge of its quality; and the court had no right to intimate to the jury that the goods might not be worth returning in the manner he did in the charge.

Durand & Carton, for defendants, contended:

1. From a perusal of plaintiff's brief it seems to us that but two questions are before the Court for consideration:

a—Did a warranty exist, either express or implied, on the sale of the 833 feet of standard belting, on May 10, 1886?

b—Was the amount paid for the belting a proper set-off in this action?

If a warranty existed, the defendants had a right to rely upon it, and had a right of action for any damages resulting from its breach; and if the belting proved absolutely worthless, the measure of such damages could be none other than the total amount paid therefor; and if such payment was made in ignorance of the real quality of the belting, it was not a voluntary payment, but money paid without consideration, and would constitute a good demand by way of set-off; citing *Petersen v. Lumber Co.*, 51 Mich. 86.

2. In view of the conflict of evidence as to the worthlessness of the belting, it became a question of fact for the jury, and their finding is conclusive; citing *Parrish v. Bradley*, 73 Mich. 617.

CHAMPLIN, C. J. This suit was commenced before a

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justice of the peace to recover the sum of $46.80 for a bill of goods described as "250 feet 6 in. Red Strip rubber belt," ordered by defendants, who reside at Flint, Mich., from plaintiff, a corporation doing business in New York city, on July 9, 1887. The declaration was upon the common counts in *assumpsit*. The defendants pleaded the general issue, and gave notice that the belting had been warranted, and did not sustain the warranty, and of recoupment of damages therefor.

The plaintiff recovered judgment before the magistrate, and the defendants appealed to the circuit court, where on leave granted the defendants added a notice of set-off containing the common counts in *assumpsit*. They also put in a notice as follows:

"The plaintiff will further take notice that the defendants in this cause on the trial thereof will further show that on the 10th day of May, A. D. 1886, they purchased of said plaintiff a quantity of Standard belting, consisting of 333 feet, for which said defendants paid said plaintiff the sum of fifty dollars, together with the freight thereon, amounting in all to sixty dollars; that said belting on the sale thereof was warranted by said plaintiff to be of first-class quality, and suitable for the purposes for which said defendants desired the same, and a quality of belting which these defendants could warrant on the sale thereof to their customers; and that said defendants purchased said belting, relying on said warranty so made by said plaintiff as aforesaid, and warranted the same on the sale thereof to their customers; that said belting, instead of being of first-class quality, and suitable for said defendants' purposes, and a quality of belting which defendants could warrant on the sale thereof to their customers, was absolutely worthless, and entirely unsuitable for said defendants' trade, and, by reason of the poor quality of said belting, the same was worthless to said defendants, and they, by reason thereof, lost the sum paid for the same to said plaintiff, to wit, the sum of sixty-dollars, and the said defendants will set off the same against the demand of the plaintiff in this action, and have the balance certified in their favor."

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Upon the trial, testimony was introduced from which it appears without contradiction that the plaintiff is a corporation organized and doing business under the laws of the state of New York, and has been engaged in the manufacture and sale of rubber belting for more than 25 years. It appears from the testimony that the defendants had dealt with the plaintiff previously to the time when the bill of goods was sold for which suit is brought. Defendants claimed that plaintiff warranted all goods purchased from it by defendants. This claim was denied by plaintiff, who introduced testimony tending to prove that it manufactured four grades of rubber belting; that the highest grade or brand was the "Monarch;" that the next grade they called the "Maltese Cross;" that the next quality they called the "Red Strip," and the next grade they formerly called the "Standard," but afterwards changed the name to "Mohawk;" that it never warranted the "Standard," and never authorized its agents to do so, and did not warrant it to the defendants. Plaintiff also introduced testimony tending to show that the plaintiff first began the manufacture of Standard belting experimentally in 1885, and put it on the market in 1886. The effect of this testimony was to disprove the warranty which defendants claimed the agent of plaintiff made in the year 1884, which they claimed was made and intended as a continuing warranty, and also the claim that they had purchased Standard belting of plaintiff previous to 1886, which gave good satisfaction and was warranted.

The defendants offered in evidence a letter to plaintiff dated July 30, 1885, containing an order for good Standard belting, warranted, 300 feet 1½-inch 2-ply; 300 feet 2-inch 2-ply; 200 feet 5-inch 3-ply; 300 feet 6-inch 3-ply,—and the invoice from plaintiff under date of August 1, 1885, filling the order and describing the belt-

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ing as "Standard." The first and third assignments of error relate to the ruling of the court in admitting this testimony. There was no error. It had an important bearing in the case in view of the claims asserted by both parties. It tended not only to support the defendants' theory that the quality of Standard belting was warranted to them, but it directly contradicted the testimony of the officers of the company that they did not warrant Standard belting in selling to defendants.

The defendants also introduced testimony tending to establish the fact that, at the time the plaintiff's agent was at defendants' place of business in 1884, he exhibited samples of their Standard belting; and that the goods ordered in July, 1885, were of the same grade and quality of the sample. It further appeared that on May 10, 1886, the defendants bought of plaintiff a bill of rubber belting amounting in the aggregate to $191.23, which they paid for; and among the belting purchased was 333 feet 6-inch 3-ply Standard belting. In fact the whole bill of eight rolls was all of the brand called "Standard" belting, and was so billed to defendants. The widths of the belts were all the way from 6 inches to 1½ inches. After defendants had paid for the 333 feet, they sold 125 feet to a customer for use upon a threshing-machine, which after about three weeks was returned as utterly worthless and unfit for use. They supplied him with another belt from the same roll, which was likewise returned. Upon the return of the first belt sold, and on October 18, 1886, defendants wrote to plaintiff notifying it that they had sold the belt to a thresher, and it had been returned and had split open in the seam. Plaintiff replied October 20, 1886, that it did not guarantee its Standard belting for use on threshing-machines. An agent of the plaintiff, by the name of Barnes, called upon defendants in March, 1887, and defendants offered

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to purchase a roll of Red Strip 6-inch 3-ply belting if plaintiff would allow the price of the 250 feet of worthless belting upon the purchase. The agent forwarded the offer to plaintiff, which it refused, and wrote to defendants March 8, 1887, explaining matters, and reiterating the statement that it never guaranteed a Standard belt for threshing purposes, and stating that it could not believe that Mr. Bradford did either, adding:

"We should like your trade, and wish you could decide to let us fill the order you gave to Mr. Barnes, without the condition you impose."

On July 9, 1887, defendants sent to plaintiff the following order:

"*Gentlemen:* Please ship via Great Eastern Line 250 feet of 6-in. 3-ply Red Strip rubber belting."

This order was received by plaintiff, and it forwarded the same about July 14, 1887. The bill amounted to $46.80, and has never been paid. Soon after receiving these goods the defendants shipped the 250 feet of Standard belting to plaintiff, and notified it that it was at its disposal. It replied that it was aware that it had been shipped back, but refused to receive it. The defendants then sent the plaintiff on August 22, 1887, the following:

"FLINT, MICH., Aug. 22, 1887.

"GUTTA PERCHA & RUBBER MANF'G CO.,
"New York.

"*Gentlemen:* Inclosed please find draft of fourteen and 78-100 dollars ($14.78) to pay—

Invoice of	$46 80
Less belt returned	32 02
	$14 78

"Yours truly,
"WOOD & ATWOOD."

The plaintiff refused to accept, but returned, the draft,

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and again refused to receive the belting. Another strip of 17 feet was sold by defendants, which also proved to be worthless, as claimed by defendants and testified to by witnesses. The balance of the 333 feet has not been returned nor offered.

The defendants claim, and introduced testimony which tended to prove, that the whole 333 feet of belting was valueless for any purpose, and they claim that, having paid for such belting, the money so paid was paid without consideration, and was so much money had and received by plaintiff to its use, and that they have the right to set it off against plaintiff's demand. If it be true that they purchased belting to sell in their business from the plaintiff with an express or implied warranty of quality, and paid for it before ascertaining that it was worthless, and if the belting was so situated that its quality could not be determined by inspection before trial, and it proved upon trial to be absolutely worthless, the defendants would have the right to recover back the purchase price, or to set it off in an action of *assumpsit* brought by the plaintiff to recover a money demand due from the defendants to plaintiff. In such case the burden of proof is upon the defendants to show not only that the goods purchased were not as represented or warranted, but also to show, in case they are not returned or tendered, that they are absolutely worthless for any purpose.

In this case the court instructed the jury upon the law of the case, as follows:

"Gentlemen of the Jury: The plaintiffs in this case are a corporation known as the 'Gutta Percha & Rubber Manufacturing Company,' who bring their suit against Charles H. Wood and William A. Atwood to recover for a bill of goods sold some time in the year 1887. There is no doubt about the amount of the claim for which the plaintiffs bring this action. It is $46.80, and interest thereon at 6 per cent. from November 1, 1887; but the

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defendants claim a set-off against this claim of plaintiffs of $44.45, and interest from the 1st of July, 1886, which they claim they paid in ignorance of the quality of 333 feet of 6-inch rubber belting which they purchased from plaintiffs by the firm name of Wood & Atwood, in 1886, and the plaintiffs request me to charge you—and I do so—

"'1. That it appears from the undisputed evidence in this case that in the month of July, 1887, the plaintiffs sold and delivered to defendants 250 feet of what is called "Red Strip belting," at the request of defendants. I charge you, therefore, that the plaintiffs are entitled to recover the value of the same, which in this case has been testified to as the sum of $46.80.'

"I have simply added 'unless you find a set-off in favor of the defendants.'

"'2. In this case the defendants have sought to have set off against this demand of the plaintiffs for the price and value of this "Red Strip belting" a claim of damages arising out of the purchase by them and their partner, Edwin Sterner, of some so-called "Standard" goods, which it is claimed did not conform to an alleged warranty. This suit is brought upon a demand for goods furnished the defendants, Wood & Atwood, upon their written order alone, and it is not competent for the defendants to set off any demand against this claim which defendants own jointly with any one else. The jury will therefore disregard the defendants' claim of set-off.'

"I have added 'unless you find that this contract out of which defendants' claim of set-off arises was made with the same Wood & Atwood, and that at the trial below it was agreed that in case of appeal the set-off might be pleaded in the circuit court, and the case tried on the merits in the name of Wood & Atwood, and without regard to Sterner.' If you find that to be so, then you would have a right to consider the set-off. I think those two are all I can give, and I have given these with a little qualification, so counsel can have the benefit of it if I am in error about it.

"I further charge you, gentlemen, if you find that Wood & Atwood, with Sterner, though the firm name was Wood & Atwood, after the receipt of this belting by them, had an opportunity to inspect and examine, and determine by such examination and inspection, the quality of the belting they received, and if defects could have been ascertained by examination and inspection thereof, and without doing so they voluntarily paid their bill, then they cannot have and set off the amount they paid at that time.

"I further charge you that a purchaser who gives an order for articles manufactured by the vendor or seller, who has before that sold and delivered to the purchaser by sample like goods, and when the purchaser gives a subsequent order for like goods, such purchaser is entitled to rely upon the integrity and judgment of the seller in selling him goods to correspond with those before received

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in kind and quality, and to fill the order according to the expectation of the purchaser when it is made; and if the purchaser has no opportunity to examine and inspect them; and if the character of the goods are such that inspection would not afford him any opportunity of detecting any defect or fault in the goods, and he, relying upon the judgment and integrity of the seller, pays for them while he is ignorant of their true condition, and under the belief that they are of the kind and quality he had ordered; and if the seller knew the business of the purchaser, and the uses to which such goods are to be put, and he does not send him the kind of goods ordered, but an inferior kind; and if you find that an inspection would not have disclosed the inferiority or imperfection of the goods received,—then the payment made upon receipt without examination would not be a voluntary payment. If you find the goods were of such a kind and quality that no inspection could have disclosed the defects, and that these defects and imperfections could only be discovered by the practical use of the goods by the purchaser, or by those to whom he has sold them, then upon discovery of the same the purchaser would be required to notify the sender within a reasonable time thereof. In this case it was some time in October, one of the letters show, when complaint was made of the quality of the goods. You will determine whether that was a reasonable time in view of all the evidence given you upon the subject of the sale of the belting and its use, and he would be entitled to recover back the amount he had paid in ignorance of the condition and quality of the goods if they were entirely worthless and of no value. If they were of some value, and not returned, if they were worth returning, then the purchaser would be entitled to recover the difference in value between the price he paid for them and the market value of the articles at the time he received them. If you find that this rubber belting was of any value, then you will determine it.

"The purchasers had the duty imposed upon them of notifying the seller of the condition of the goods and their refusal to accept them, or they could return them. If the purchaser keeps them after he has made the discovery, he must account for them at their market value; that is, when their condition is discovered after payment made. If they were worthless entirely, and of no value, it would not be necessary to return them. But the burden of proving such is the case is on the defendants to show by a preponderance of evidence that the goods were of no value.

"If you find that the goods were not entirely worthless, but were of some value, then you will determine that value and deduct that from the amount of the defendants' claim, the market value of such rubber, and the balance remaining you would deduct from the plaintiff's claim, if it is less than the plaintiff's claim, and the

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balance would be the amount of your verdict. If the defendants' claim be greater than the plaintiff's claim,—that is, if you find that the goods were absolutely worthless, and were not of the kind ordered, and that the payment made for them was not a voluntary payment made by defendants, and was made in ignorance of the condition and quality of the rubber without any fault or negligence on their part, and could not have been discovered by inspection,—then you could deduct plaintiff's claim from defendants', and the balance would be your verdict for defendants."

We think the court erred in instructing the jury that if the goods were not entirely worthless, but were of some value, then they should find that value, and deduct that from the amount of the defendants' claim. But we are also satisfied from the verdict of the jury that it was error without prejudice, as the jury found the full amount of the defendants' claim, which shows that they must have found also that the goods were of no value. This error in the charge was not passed upon by the decision of *Copas v. Provision Co.*, 73 Mich. 541. The remainder of the charge of the court is sustained by *Petersen v. Lumber Co.*, 51 Mich. 86. We have examined this record with great care, and we are satisfied that no prejudicial error has been committed.

Judgment affirmed.

The other Justices concurred.

MAGGIE F. TICE v. BAY CITY.

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[See 78 Mich. 209.]

Municipal corporations—Defective sidewalk—Evidence.

1. After the statute creating a liability on the part of cities for injuries sustained by reason of defective sidewalks took effect,

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it became the duty of such municipal corporations, if they continued to maintain sidewalks which were out of repair when such liability attached, to put them in good repair, and to keep them in a condition reasonably safe for public travel; and in a suit to recover damages for an alleged failure so to do, the length of time the sidewalk had been out of repair prior to the injury is a legitimate subject of inquiry, without reference to the date when the statute became operative.

2. The plaintiff in a negligence case claimed to have been injured by getting her foot into a hole in a sidewalk at a point about midway between two gates leading into certain premises. The evidence as to defects was confined to that point, but the testimony developed that there was more than one hole, and some of the witnesses, not knowing in which hole the plaintiff's foot was caught, were interrogated on both sides as to the location of the holes they observed; but the jury were instructed that the plaintiff could not recover unless the city had knowledge, actual or constructive, of the *identical hole* into which the plaintiff stepped, and the *existence* of the other holes was not permitted to be used to show notice of this particular defect. And it is held that there was therefore no error in the admission of the testimony concerning the other holes.

3. In a negligence case against a city for injuries sustained by reason of a defect in a sidewalk, the court, at the request of the defendant's counsel, instructed the jury that if they found that the street commissioner went over the walk within two weeks previous to the accident, and looked out for defects in a careful manner, and did not see the defect complained of, and had no actual knowledge of its existence, he used such care and diligence as was required of him, and that the defendant was not liable. The court added an instruction that, in determining the first three questions, the jury might consider *all* of the testimony in the case as to the existence of the defect previous to the time the commissioner went over the walk, and that, if they found that it was there when such examination was made, they could consider that fact in determining whether the commissioner used due care. And it is held that the added instruction was good law, and very properly given under the circumstances, there being testimony in the case that the defect had been there for months.

Error to Bay. (Cobb, J.) Argued January 6, 1891. Decided February 6, 1891.

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Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

John C. Weadock, for appellant.

Shepard & Lyon, for plaintiff.

MORSE, J. This case has been in this Court once before, and will be found reported in 78 Mich. 209.

The plaintiff sues for damages occasioned by her foot being caught in a hole in the sidewalk upon the east side of Jefferson street, in Bay City, at a point about midway between two gates, leading into the county jail premises, the gates being 75 feet apart. Two facts are settled beyond dispute by the record:

1. That the plaintiff was injured by getting her foot into a hole in the sidewalk in the locality described in her declaration.
2. That there was no proof that any officer of the city had actual knowledge of the existence of this hole prior to the accident.

There is no claim of any contributory negligence on the part of the plaintiff, and the main issue, therefore, was whether the hole had existed in the sidewalk so long that the city was in duty bound to take notice of its existence. Some errors are assigned upon the admission of testimony which we do not deem necessary to discuss, and we shall, therefore, only consider such alleged errors as seem to us to present matters of general importance, which may be likely to arise in other cases of a similar nature to the one in hand.

The accident to plaintiff occurred on December 6, 1887. The law of 1887, creating a liability in cases of defective sidewalks, was considered by the court and all parties in the court below as taking effect September 28, 1887.[1] Testimony was introduced on the part of the plaintiff tending to show

[1] Act No. 264, Laws of 1887.

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that the defect in the sidewalk, of which she complained, existed in the months of May, June, July, and August, 1888. This testimony was objected to, and the court was asked to instruct the jury that they could not consider the evidence as to the condition of the sidewalk in those months, because at that time the city was not liable for any defects in the sidewalk. This request was properly refused. If this hole existed prior to September 28, 1887, and continued up to December 6, 1887, the city was not only bound to take notice of it, but in law had ample time between these last two dates to repair the sidewalk. The defendant was not authorized to leave the sidewalk as it was on the day the law took effect. If, after that, the city continued to maintain the sidewalk, it was its duty to put it in good repair, and to keep it reasonably safe for public travel; and the length of time it had been out of repair was a legitimate subject of inquiry, without reference to the date that the law went into effect.

Objection is also made that testimony was admitted of the condition of the walk at other places than were the injury occurred.[1] The evidence was not only confined to the space between the two gates, but to near the middle of such space. The testimony developed that there was more than one hole there, and some of the witnesses, not knowing in which hole the plaintiff was injured, were interrogated on both sides as to the location of the holes they observed; but the jury were instructed that plaintiff could not recover unless the city had knowledge, actual or constructive, of the identical hole into which the plaintiff stepped, and the existence of the other holes was not permitted to be used to show notice of this particular defect. There was therefore no error in the admission of this testimony.

[1] Counsel for appellant cited the former opinion in this case, and *Dundas v. Lansing*, 75 Mich. 499.

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The defendant's counsel asked the following instruction to the jury:

"If you find that the street commissioner went over this walk within two weeks previous to the accident, that he looked out for defects in a careful manner, and did not see this defect, and had no actual knowledge of its existence, then he used such care and diligence as was required of him, and the city is not liable."

The request was given by the court, with the following addition:

"But in determining the fact whether he did go over it within two weeks, and did look out for defects in a careful manner, and did not see this particular defect, you may consider all the testimony in the case as to the existence of the hole previous to the time he went over the place, and, if you find the hole was there when he examined it, you may consider that in determining whether he did use due care."

This addition was good law, and very properly made under the circumstances, there being testimony in the case that the hole had been there for months.

Some other remarks were made by the court in regard to this request which are objected to by the defendant, but such remarks were withdrawn by the court, and the law subsequently stated as above. We do not think we can predicate error upon the remarks that were withdrawn by the court, as we cannot find, upon a review of the whole case, that the defendant could have been prejudiced thereby; nor are we prepared to say that the remarks objected to would have been error if they had been permitted to stand as a part of the charge. The court also told the jury that—

"Notice could not be inferred or presumed unless the defect was open and notorious, or of long standing, and of such a character as would naturally arrest the attention of persons passing by."

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The case was very fairly tried, and the charge of the court was a remarkably clear and full exposition of the law bearing upon the issues involved.

The judgment is affirmed, with costs.

The other Justices concurred.

WILLIAM STIMER v. JOTHAM BRYANT.

[See 79 Mich. 260.]

Illegal service of process—Action—Malicious prosecution.

A judgment in justice's court, based upon the service of a summons by a private person, who was not properly designated for that purpose under the statute, was affirmed on special appeal in the circuit court, and reversed in the Supreme Court, with costs to the defendant. And it is held that all of the damages suffered by the defendant were the result of the decisions of the courts in holding that the summons was legally served, and for which he had received the full benefit of the only remedy afforded by law, viz., a judgment for costs.

Error to Jackson. (Peck, J.) Argued January 6, 1891. Decided February 6, 1891.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Dwight D. Root, for appellant.

J. A. Parkinson, for defendant.

GRANT, J. One Frederick Gadsby brought suit in justice's court against the plaintiff. The justice placed the summons in the hands of the defendant, Bryant, for

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service. Bryant was not an officer. The defendant served and returned the summons. Plaintiff appeared specially, and moved to quash the suit for want of jurisdiction. The justice overruled the objection, and judgment was rendered against the plaintiff. Plaintiff then took a special appeal to the circuit court, which sustained the judgment in the justice's court. Plaintiff thereupon appealed to this Court, and the judgment was reversed. *Gadsby v. Stimer*, 79 Mich. 260. The costs of the plaintiff in that suit were taxed at $130.03.

After the decision of this Court in that case, plaintiff brought this action on the case. His allegations of liability are—

1. That the defendant, contriving and wrongfully, wickedly, and unjustly intending to injure the said plaintiff, and to deprive him of his private and public credit and the quiet enjoyment of his property, did unlawfully, wrongfully, wantonly, and without any authority whatever so to do, serve upon said plaintiff a summons,—describing the summons in *Gadsby v. Stimer*.

2. That said defendant, knowing that said justice had no jurisdiction in said cause, did wrongfully, unlawfully, and negligently testify therein, and by his evidence wrongfully, unlawfully, and negligently aided, assisted, and caused said justice to render judgment against him for $25 damages, and $3.43 costs of suit.

3. That said defendant also with like negligence testified upon the trial in the circuit court.

The declaration then alleges that Gadsby has neglected and refused to pay the costs of that suit, and owns no property subject to execution, and therefore plaintiff claims the right to recover these costs against the defendant. The defendant demurred to the declaration, alleging that it sets forth no cause of action. The demurrer was sustained, and plaintiff appeals.

It is difficult to see upon what ground the defendant could be held liable for the service of a summons held to

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be valid by both the justice's and circuit courts. It is more difficult to see upon what theory of the law the defendant could be held liable for appearing as a witness in the case. The declaration does not make out a case of malicious prosecution. It does not set out that Gadsby had not a good cause of action against plaintiff. That issue does not appear to have been made, the plaintiff choosing to rely upon the alleged invalidity of the service, which was finally decided in his favor. It does not allege that the process was illegally or improvidently sued out; nor that the suit was instituted with malicious intent; nor that plaintiff had any defense to the action; nor that the justice acted in bad faith; nor that there was any concert of action between defendant and Gadsby to injure plaintiff; nor that the defendant's testimony was untrue; nor that he in any manner influenced the decision of the justice or of the circuit court in sustaining the validity of the service. There is no allegation in the declaration of any violation of legal duty to the plaintiff, nor of any wrongful conduct for which the defendant can be held liable. All the damages suffered by the plaintiff were the result of the decisions of the courts in holding that the service of the summons was legally made. For these damages the plaintiff has received the full benefit of the only remedy afforded by the law, viz., judgment for costs.

Judgment affirmed.

The other Justices concurred.

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WILLIAM LADU v. HARLOW A. LADU AND ADA HYDREN.

Bill to cancel deed—Fraud.

Complainant filed a bill to set aside a deed of his farm which he had executed and delivered to his son; and upon a review of the evidence it is held that the only conditions imposed by complainant upon the delivery of the deed were the execution of a life-lease to complainant, and of a mortgage for $1,000 to defendant's sister, which conditions have been performed.

Appeal from Shiawassee. (Newton, J.) Argued January 8, 1891. Decided February 6, 1891.

Bill to set aside a deed and mortgage. Defendant Ladu appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

Hugh McCurdy, for complainant.

Lyon & Hackleman, for appellant.

[Briefs are confined to a discussion of the evidence.—REPORTER.]

MCGRATH, J. Complainant files a bill to set aside a deed given in 1887 by complainant, the father, to Harlow A. Ladu, the son, and a mortgage given by the son to his sister Ada Hydren.

Complainant avers that he is 67 years of age; that he was the owner of this farm, worth $3,500; that in 1885 his wife died; that he has three children, Harlow A. Ladu, Prudah Bentley, and Ada Hydren; that, in the fall of 1886, his son, with his wife and three children, came to live with complainant, and in course of time began to importune complainant to give him a deed of the farm, promising that—

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"If you will let me have it [the farm] I will live with you, and work the farm, and will support you in your old age, and will fix up the fences and slick up the farm nice, and give a mortgage on the farm to Ada for $1,000, and, if you ever want the farm back, I will deed it back to you, and if you never want it back, Ada will have a thousand dollars."

That being fully overpersuaded by the son, and believing that he would do as he agreed, he yielded to his promises and entreaties, and deeded the farm to him; that, when defendant Ladu received the deed, he did not execute the mortgage until October, 1887; that no consideration was paid for the deed or mortgage, and defendant Ladu has not paid any part of the mortgage; that in October, 1887, the son executed and delivered to complainant what purports to be a life-lease of said farm, which was done further to cloud complainant's title and defraud him out of the farm; that the defendant Harlow A. Ladu failed to keep and perform the conditions upon which he received the deed, and refuses to redeed the farm as he agreed to do; that defendant Ada Hydren offers to release her mortgage, if her brother will redeed the farm.

Defendant Harlow A. Ladu admits the execution of the deed to him; denies that the conditions named were imposed, other than that he was to execute the mortgage to his sister; denies that he importuned complainant to give the deed, or that he made the alleged promises; avers that he executed the mortgage; that the execution of the deed to him was a part of a general plan devised by complainant to distribute his property to his children; that his father owned not only this farm, but a smaller farm of 35 acres, and a lot and store in Williamston; that the deed to defendant was voluntary, and, at the time of its execution, complainant executed a deed of the other farm to Prudah Bentley, and a deed of the

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Williamston property to complainant's granddaughter, and that the mortgage to the defendant Ada Hydren was her portion; and denies all allegations of fraud or of default.

The testimony, as to the conditions upon which the deed to defendant was given, is conflicting, as is that with reference to defendant's willingness to remain upon the farm. It appears that complainant was 65 years of age at the time of the execution of the deed; that defendant Ladu was not strong physically; that he lived upon the farm until he was 22 years of age, and then married, and for three years after that continued to live upon the farm with his wife; that prior to his mother's death he learned the trade of harness-making, and, for some years prior to his mother's death, he followed that business; that, his health failing, he gave up that business, and at the time of his mother's death, in 1885, he was with his wife and children traveling, giving concerts; that in 1886 he made a visit to his father's house, where his father, his sister Ada (about to be married), and his niece were living; that his father urged him to remain upon the farm, and he did so until the fall of 1888. The son testifies that, some time during the spring or summer of 1887, his father told him that he had conveyed to him the farm, and, in the fall of the same year, the father told him to go to one Pulver's, execute the life-lease and mortgage, and get his deed, and have it recorded, which he did; that he continued to live on the farm, his father managing and conducting it, until the fall of 1888; that in the fall of 1888 it was noised about that the father contemplated remarriage; that the son spoke to the father about it, and the father replied that he knew his own business; that from that time the father began to grow secretive, sullen, and morose, moved into a separate part of the house with his granddaughter, and ordered his meals there; that the son, knowing that his father was

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about to marry, and believing that he (the son) and his family were in the way, constructed one of his traveling cars, moved into it, remaining there all winter, continuing to do the fall work on the farm; that soon afterwards his father married; that, after his wife came, the son's wife and the children were accused of stealing little things from the house, and in the spring defendant left the farm.

One James M. Pulver is called as a witness, and says that he made out the deed, the life-lease, and mortgage at the instance and by direction of complainant; that complainant told witness at that time that he was not in good health, and wanted to distribute his property; that, at the same time, witness drafted other deeds to the other children; that the deed running to Harlow remained as originally prepared; that all the papers remained in witness' hands for some time, and the other papers were afterwards changed, and those originally prepared were destroyed.

Daniel Hydren was called by complainant, and says that in November, 1887, Harlow told him that he had executed a mortgage to Ada, and that his father had it; that the witness told Ada about it; and afterwards, in 1889, complainant, in the presence of witness, gave the mortgage to Ada.

It is quite clear from this testimony that, although the deed was executed in February, it was not delivered until the fall, and was recorded in November; that the mortgage was in complainant's hands from the time of its execution, in October, 1887, until some time in 1889; that the life-lease was received by the father from the son in the fall of 1887, was retained by complainant, and was in his possession when the bill here was filed; that the control of the farm and its management were never yielded up by the father to the son; that, for nearly a

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year after the delivery of the life-lease and mortgage to the father, the relations between father and son continued to be the most cordial, as they had always been and were up to the contemplated remarriage of the father, which took place in the fall of 1888.

These undisputed facts are entirely inconsistent with complainant's theory that the condition of the gift of the farm to the son was the support of the father by the son, or that the mortgage was not executed as agreed, or that the life-lease was an after-thought of the son's. The relations between father and son, and between the father and the son's wife and family, had always been unusually pleasant and cordial, and it was the undoubted intention of both parties, at the time of the delivery of the deed, that the son should remain upon the farm, and that all should live together in the old farm home as one family; but, in view of the father's contemplated marriage, the son and his family were in the way, and the son gave way to the father's evident desire, manifested not openly and frankly, as it should have been, but by changed demeanor and unpleasant conduct. We find, therefore, that the only conditions imposed by the father upon the delivery of the deed were the execution of the life-lease and mortgage, and that those conditions have been performed.

The decree of the court below is therefore set aside, and the bill of complaint dismissed, with costs of both courts to defendant.

The other Justices concurred.

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IN THE MATTER OF THE APPEAL OF EMIL MOORES.

[See 65 Mich. 652.]

Will—Lands subject to legacy—Sale—Notice—Jurisdiction of probate court.

A wife by her will bequeathed $15,000 to her son, to be paid to him on arriving at full age, and devised certain real estate to her husband. The will provided that if, after the payment of her debts and the charges of administration, the estate proved insufficient to pay the legacies in full, they be paid in a specified order, the son's legacy being given priority over the devise to the father. The husband was appointed executor, and sold a portion of the land devised to him at private sale, conveying the same in his individual character and as executor, and such proceedings were thereafter had in probate court as resulted in his being directed to pay over to his son's guardian the amount due from him to the estate, which payment he failed to make, and absconded. An administrator was appointed, who, after a judgment had been rendered upon the executor's bond for the amount due the legatee, and after return of an execution unsatisfied, filed a petition in the probate court for the sale of the land devised to the husband to pay the balance due on the son's legacy; and in affirming an order for such sale it is held:

a—That the land devised to the husband is subject to the son's legacy.

b—That the purchaser from the husband is chargeable with notice of what an examination of the probate records would have disclosed, namely, that there had been no settlement of the estate, and that the son's legacy had not been paid; and that he could get no better title under his deeds than the husband had at the time of their execution.

c—That, under the facts appearing in the case, the probate court had jurisdiction to make the order, and a resort to equity was unnecessary to subject the land to the payment of the legacy.

d—That the right of the legatee to follow the land for the payment of his legacy was not barred by the statute of limitations, the estate never having been closed, and it being apparent from the terms of the will that it was not intended that it should be closed in the six years within which, as claimed,

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an executor can be authorized to sell lands to pay legacies; the case being ruled by *Church v. Holcomb*, 45 Mich. 29.

Error to Saginaw. (Gage, J.) Argued January 7, 1891. Decided February 6, 1891.

Appeal from order of probate court granting the petition of an administrator for the sale of certain devised lands to pay a legacy. Judgment of circuit court, affirming order of probate court, affirmed. The facts are stated in the opinion.

Hanchett, Stark & Hanchett, for petitioner, contended:

1. In support of the claim that the legacy was made a charge upon the real estate devised to the husband, counsel cited *Tewksbury v. French*, 44 Mich. 100; *Cummings v. Corey*, 58 Id. 496, 500; *Palms v. Palms*, 68 Id. 361; *Eyer v. Beck*, 70 Id. 181; *Morrison v. Sessions Estate*, Id. 308; which charge is of such a nature that it may be enforced in equity; citing *Dill v. Wisner*, 88 N. Y. 153; *Bugbee v. Sargent*, 23 Me. 269; *Grode v. Van Valen*, 25 N. J. Eq. 98; and the fact that the legatee is an only son is to be taken into account in deciding upon the intent of the testatrix to have the provision for him made good out of her estate, and a charge upon the realty; citing *Van Winkle v. Van Houten*, 3 N. J. Eq. 172, 190, 191.
2. The lien of a legacy charged on land is like a mortgage lien, and can be divested only by actual payment to, or release by, the legatee, unless the will provides some other mode; citing *Schanck v. Arrowsmith*, 9 N. J. Eq. 314; *Terhune v. Colton*, 10 Id. 21; *Grode v. Van Valen*, 25 Id. 95; *Blauvelt v. Van Winkle*, 29 Id. 111; *Jenkins v. Freyer*, 4 Paige, 50; *Phillips' Appeal*, 7 Atl. Rep. 918; *Lovejoy v. Raymond*, 58 Vt. 509; *Bidwell v. Whitaker*, 1 Mich. 472; *Lafferty v. Bank*, 76 Id. 35.
3. The authority of the executors to sell is confined to real estate "not specifically devised," and they could only apply under the statute which authorizes a sale under leave of the court to pay a legacy when made a charge upon land; citing Comp. Laws 1857, § 3064; How. Stat. § 6050, as amended by Act No. 119, Laws of 1883 (3 How. Stat. p. 3592).
4. The deeds to Moores only conveyed to him the interest which George A. Lathrop had in the land as devisee. As such devisee he could take possession and receive the rent and income until the estate was required to pay debts or legacies charged

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thereon, and he could convey his estate such as it was; citing Act No. 208, Laws of 1875; How. Stat. § 5875; *Streeter v. Paton*, 7 Mich. 350, 351; *Howard v. Patrick*, 38 Id. 802; *Lafferty v. Bank*, 76 Id. 59.

5. Emil Moores took the land subject to the charge made thereon by the will, and, as he makes his title through the will, he must be charged with full knowledge of its provisions; citing 2 Red. Wills, 210; 1 Story, Eq. Jur. (12th ed.) § 566*b*; *Harris v. Fly*, 7 Paige, 421, 424; *Burns v. Berry*, 42 Mich. 176, 180; *Pierce v. Holzer*, 65 Id. 273; *Lafferty v. Bank*, 76 Id. 59.
6. The probate court had jurisdiction to grant the license to petitioner; citing *People v. Circuit Court*, 11 Mich. 393; *Winegar v. Newland*, 44 Id. 367; *Church v. Holcomb*, 45 Id. 29; and the proceedings appealed from were expressly authorized by How. Stat. § 6050, as amended in 1883.
7. The suit upon the bond does not affect the lien, or work a forfeiture of the same; citing *Pierce v. Holzer*, 65 Mich. 273, 274; *Terhune v. Colton*, 10 N. J. Eq. 21; *Schanck v. Arrowsmith*, 9 Id. 314; *Reynolds v. Bond*, 83 Ind. 36.
8. The lapse of time does not oust the court of jurisdiction, because the circumstances of the estate, the conduct of the executor, Lathrop, and the attempt of petitioner to enforce the legacy, continue such jurisdiction; citing *Larzelere v. Starkweather*, 38 Mich. 96, 100, 101; *Church v. Holcomb*, 45 Id. 29; and, further, the terms of the will do not contemplate a sale except as the executors could make it without sacrifice.

Wheeler, McKnight & Grant (*Wisner & Draper*, of counsel), for appellant, contended:

1. The probate court had no jurisdiction to make the order appealed from. A court of equity is the only tribunal that can do justice between the parties, and protect the rights of all; citing *Brown v. Knapp*, 79 N. Y. 136; *Atwood v. Frost*, 51 Mich. 360.
2. By the fourth clause of the will, Lathrop became the owner of the lands in controversy, and, if subject to any claim thereon, it was that they might be sold for payment of debts or legacies within six years. He and his grantor had been in actual possession for more than eleven years before this petition was filed. Moores' rights became vested while this six-year limitation was in force, and he cannot now be disturbed. The act of 1881 (No. 236) is not retroactive; citing *Van Fleet v. Van Fleet*, 49 Mich. 610.
3. The land was not charged by the will with the payment of the $15,000 legacy. This legacy was payable out of the personalty of the deceased, if that was sufficient, and the fact that the

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executor wasted it does not give the legatee the right to follow the land. There is nothing in the record showing that the personal property was not sufficient for the purpose named. If it was not, the petitioner should have shown this fact; citing *Duncan v. Wallace*, 114 Ind. 169.

4. Lands specifically devised are not charged with payment of legacies, unless the will directly charges them, or an intention so to charge them clearly appears from the will; citing *Robinson v. McIver*, 63 N. C. 645; *Belcher v. Belcher*, 12 Atl. Rep. 230; *Wright v. Denn*, 10 Wheat. 204; *Hoyt v. Hoyt*, 85 N. Y. 142; *Heslop v. Gatton*, 71 Ill. 528; *Chase v. Davis*, 65 Me. 102; *Davenport v. Sargent*, 63 N. H. 538.

5. The intention of the testatrix, as shown by the will, was that her property not specifically devised was to be used in paying the legacies in full, and, if it should be found insufficient to pay all, then they were to be paid in the order named; citing 2 Red. Wills, 462; *Davenport v. Sargent*, 63 N. H. 538; *Chase v Davis*, 65 Me. 102, 107.

MORSE, J. April 13, 1875, Helen L. Lathrop executed her last will, in which she gave her son, John N. Derby, a legacy of $15,000, and devised to her husband, George A. Lathrop, certain lots, describing them, in East Saginaw. This will was duly admitted to probate December 30, 1875, and George A. Lathrop and Augustine S. Gaylord appointed executors, who both duly qualified. Gaylord, however, took no part in the actual management of the estate, and died June 21, 1877.

The will of Mrs. Lathrop gave all her personal clothing and jewelry to a sister. Then follows the bequest to her son, John N. Derby, of the homestead and all the furniture and personal property therein;—

"Also the sum of $15,000 in money, the said money to be kept invested, and the interest thereof applied to his maintenance and suitable education until he shall attain the age of 21 years, the principal and any accumulation of the interest not required for the purpose aforesaid then to be paid to him."

Then follows a devise to her husband as follows:

"*Fourthly.* I give and devise unto my beloved husband,

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George A. Lathrop, his heirs and assigns forever, lots 4 and 9, and the south 24 feet of lot 5, in block 15, according to Hoyt's plat of East Saginaw, with the houses thereon."

She also gives him "block 10 in Derby's addition to the village of Salina, now in the city of East Saginaw, to dispose of the same when and how he may deem proper," the proceeds of the same to be used for the benefit of his son, George D. Lathrop. She also devises certain real estate to her sister, and $500 to a domestic in the family, and $6,000 to her executors in trust, the interest of such sum to be paid in equal proportions to a brother and sister annually, during their natural lives, the principal sums at their deaths to be paid to her son, John N. Derby, if then living and of the age of 21 years; the said sum to be mainly made out of the sale of real estate. The will then provides that if, after the payment of her debts and the charges of administration, her estate shall prove insufficient to pay the legacies in full, then she directs that they be paid in the following order:

1. The bequest to her sister of her personal clothing and jewelry.
2. The bequest to her son, John N. Derby.
3. The devise and bequest in the fourth clause of her will, to her husband, George A. Lathrop.

—And thereafter naming the order in which she wishes the other bequests paid. All the rest, residue, and remainder of her estate she gives to her son and husband, share and share alike. She appointed Lathrop and Gaylord her executors, and authorized and empowered them to sell and convey any and all of her estate not specifically devised in the will, for cash or upon credit, or both, as to them might seem best, and out of the proceeds of such sales to pay and discharge the debts and expenses of administration, as well as the legacies;

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"said legacies to be paid as soon as convenient after my decease, without sacrifice to my estate."

This matter comes before us upon petition to the probate court and order of such court, appealed from to the circuit court and affirmed and modified, and from that court brought here for review upon writ of error. The points involved in said petition and order will be discussed as we proceed. The modification of the probate order made by the circuit court is not material to this issue. There were findings of fact by the circuit judge, and we shall first give a summary of so much of such findings as is necessary for an understanding of the matters at issue.

February 24, 1876, Lathrop, as executor, filed an inventory in the probate court, showing real and personal estate to the value of $26,468.91. October 25, same year, he filed a partial account, showing cash received by him up to October 23, $5,266.23; disbursements, $2,124.89. August 21, 1879, another account was rendered, showing total amount received by him, $12,734.52, and total amount expended, $12,137.02, leaving balance of $597.50. In the inventory made and filed in the probate court the land devised to Lathrop, and block 10 of Derby's addition, devised to him for the benefit of his son, were not included. December 18, 1877, Lathrop traded seven lots in this block 10, and lot 9, block 15, Hoyt's plat, to one Henry Colclaugh for a farm in Royal Oak, for the agreed consideration of $3,500. The title to the farm was taken in the name of Joseph Lathrop, of Detroit, and the transaction was had without any action by the probate court thereon. June 18, 1881, Lathrop sold to Emil Moores lot 4 and the south 24 feet of lot 5, block 15, Hoyt's plat of East Saginaw, being part of the property devised to him in the fourth clause of his wife's will, for $2,000, which sum Moores paid him in cash, and which

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was its full value at the time of such sale. No proceedings were had in the probate court at the time. Moores knew that said property was a part of Helen L. Lathrop's estate, but did not himself investigate the title, but left that entirely with his attorney, and in his purchase relied upon the report and opinion of such attorney. The conveyance was in two deeds,—one a quitclaim from George A. Lathrop, and the other an executor's deed, in which Lathrop covenanted only as against his own acts.

Lathrop, before February 9, 1883, paid all the debts and expenses of death and administration except his own charges. He made sale of the real estate devised in the sixth clause of the will to Mrs. Lathrop's sister, Caroline E. Hayden, for the purpose of paying debts and the legacy to John N. Derby, under due application to the probate court and the order of such court granted on such application, and had converted into cash all the rest of the real and personal estate of his wife, except two contracts for the sale of land, upon which there was due about $115. June 3, 1880, the probate court ordered that Lathrop should close the settlement of the estate within six months. He failed to do so, and was cited into court to account, and to show cause why he should not pay over to the guardian of John N. Derby the legacy due to him. Lathrop, in obedience to this citation, filed his account, upon which hearing was had. This account was filed February 9, 1883. In this account for the first time he charged the estate with the moneys paid out by him in the farm transaction with Henry Colclaugh, and charged as a credit to the estate the money received by him in the same transaction. He also credited the estate with the $2,000 received from Emil Moores. But the probate court struck out all the items of said account on both sides, credit and debit, in relation to the farm transaction, and also the $2,000 item received

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from Moores. The record does not contain the full, itemized account. It shows only the items that were disallowed by the probate court. The account, as filed, showed total receipts, $33,821.16, and total cash disbursements, $29,980.62; leaving a balance in favor of the estate of $3,840.54, from which was to be deducted the compensation of Lathrop as executor.

It is also found as a fact that Lathrop took possession, after the probate of the will, of the real estate devised to him and his son, and received the rents and profits thereof, and paid the taxes and repairs. June 9, 1880, a paper was filed in the probate court showing that this property was not included in the inventory of his wife's estate, because the said estate had been supposed to be sufficient to meet all prior demands, and that individual possession of the property had been taken by said Lathrop. The moneys received by him for rents, and the moneys expended by him on said property, were included by him for the first time in his account of February, 1883, and on the hearing of such account all these items were stricken out. After striking out all these items heretofore mentioned in regard to the farm transaction and this property devised to him and his son, and disallowing an item of $500 paid by him to Mrs. Ihrig, the probate court charged him for $1,500 lost by mismanagement of certain property, and allowed him $355.44 for his services and expenses as executor, and a balance was struck, from which it would appear that he was found to be in debt to the estate in the sum of $5,177.70. It was also ordered that the legacy to Derby had the preference in the estate, and $6,601.04 was found to be still due and unpaid upon it; and Lathrop was directed to pay the said sum of $5,177.70 over to David H. Jerome, the guardian

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of said Derby. Lathrop failed to make this payment, and, pending the hearing on account, absconded.

In October, 1883, Jerome, as guardian of Derby, took steps to bring suit upon Lathrop's bond as executor. Judgment was rendered in this suit December 3, 1885, for $6,100.88. The case went to the Supreme Court, and was affirmed April 28, 1887.[1] Execution was duly issued and returned, and no property could be found out of which to pay such judgment. May 26, 1887, Jerome filed the petition in this case in the probate court, setting forth the essential facts, claiming that the land devised to Lathrop and his son had not been lawfully disposed of; that the same was legally still a part of Mrs. Lathrop's estate, and subject to the legacy of Derby; and praying that the same might be sold under the order of such court to pay said legacy, and that the lands sold to Emil Moores be first sold, and then the lands traded to Colclaugh for the farm in Royal Oak, and lastly, lot 10, block 10, of Derby's addition, sold to Eli Le Clerc. All the parties interested were notified of the hearing of said petition. December 10, 1887, the probate court granted the petition, and found the balance due to Derby to be $8,722.66. Lathrop, before the filing of this petition, had been removed, and Jerome appointed administrator, in which capacity he filed such petition. The court ordered the sale of the property, changing somewhat the order in which the property was to be sold, but leaving the Moores land the first to be sold, as prayed in said petition. Moores appealed to the circuit court, stating his reasons.

Those relied upon here are as follows:

1. The probate court had no jurisdiction to make the order.

2. The executor, George A. Lathrop, having had in

[1] See 65 Mich. 652.

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his hands sufficient assets and money to pay the legacy, the amount of the legacy unpaid must be collected of him and his surety on his bond, and there is, therefore, no lien on Moores' land.

3. The land was specifically devised to Lathrop, and not subject to the payment of Derby's legacy.

We are satisfied that the land devised to Lathrop was subject to Derby's legacy. It is expressly made so by the terms of the will, provided that, after the payment of the debts and expenses of administration, the estate shall be found to be insufficient to pay all the legacies in full. Moores cannot be considered a good-faith purchaser. He knew, or could have known by consulting the records in the probate court, that there had been no settlement of the estate, and that the legacy of John N. Derby had not been paid. He could get no better title to the land than Lathrop had at the time it was sold to Moores.

It is contended that there was personal property enough in the hands of Lathrop to have paid this legacy, and that Moores ought not to be held responsible for the wasting of it, or its misapplication by Lathrop. There is no showing in the record what the amount of the personal property was. The account of Lathrop, as settled by the probate court, shows that he had in his hands $5,177.70 only that could be applied on this legacy, when there was $6,601.04 due upon it. The account as allowed is not controverted, nor is it shown what his disbursements were, or where his receipts of cash came from. We must consider, therefore, that his expenditures were lawful and proper. If so, then there was not cash enough, without resorting to this real estate devised to him for his own use and that of his son, to pay this legacy in full.

The question, then, arises, who is to lose this $5,177.70 which Lathrop had in his hands, and ought to have paid on this legacy, but which he has squandered or stolen?

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Shall the infant heir lose it, or shall Moores, who bought under the circumstances heretofore noted, lose what he paid upon the land? We think the land must pay it, or be used as far as it will go to do so. No one, if Lathrop had never sold the land, would deny the right of the probate court to subject the same under the will to the payment of the balance of this legacy. Lathrop could not be heard to say that he had received personal or other property of the estate sufficient to pay this legacy, but he had wasted or stolen it, and therefore Derby must look to him personally and his bonds to make up the deficiency, and that the lands, although not disposed of, and still in his possession, could not be sold by the probate court to pay such legacy. He could not thus profit by his own wrong. As Moores could get no better title than Lathrop, and stands in his shoes, the legatee has the same right against the land standing in his name, unless some laches or statute of limitations has deprived him of such right.

It is further urged against the authority of the probate court to make this order that the suit to subject this land to the payment of this legacy should have been brought in equity; that, if this land is charged with its proportion of the legacy, all the other lands sold or traded by Lathrop are equally chargeable, and all persons purchasing such lands must be made parties; that a court of equity only, in such case, can fix the rights of the different parties, and do justice between them. We are not informed by this record how much real estate the testatrix owned at her death outside of the homestead and the lands devised to Lathrop and Caroline E. Hayden, except as stated in the petition of Jerome; and in such petition it is not stated to whom the same was sold, or how much was received upon the sale of the same, but it would seem from the findings of fact that the same

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was sold either under the order of the probate court or with the consent of such court; and the petition avers that there is no property remaining out of which to make this legacy, except the lands ordered to be sold in response to the prayer of such petition. We cannot assume that the other real estate was sold for any other purpose than a lawful one, to wit, the payment of debts and this legacy to Derby; and it is expressly found by the circuit judge that the real estate devised to Caroline E. Hayden was sold by the order of the probate court for such purpose. In relation to the real estate traded to Henry Colclaugh, it was stipulated by Moores' attorneys that the same might be discharged from the payment of the Derby legacy upon the payment of $2,500, to be applied upon said legacy; the amount paid being considered equal to the value of said real estate. It must therefore be considered that the real estate purchased by Moores is still the property of Mrs. Lathrop's estate, and nearly, if not quite, all the property that can be used to pay the balance of this legacy. We do not think it was necessary to go into equity to subject this land to the payment of this legacy.

It is further claimed that the lapse of time is a bar to the enforcement of the right of the legatee to follow this land for the payment of his legacy; that the time in which an executor can be authorized to sell lands for payment of legacies was limited to six years under the statutes in force at the time of Mrs. Lathrop's death. The will was probated December 30, 1875. The executors qualified January 22, 1876. We think the court of probate had not lost its jurisdiction. The estate had never been closed, and there was a will, which, by its terms, evidently did not intend that the estate should be

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closed in six years. This case is ruled by *Church v. Holcomb*, 45 Mich. 29, 37, 38.

It must be remembered, also, that John N. Derby is the only heir at law of Mrs. Lathrop, and only he, George A. Lathrop, and Moores are interested in this question. Derby is moving for the sale, and Moores, as heretofore ruled, must stand in the place of George A. Lathrop, and has no better right than Lathrop to contest these proceedings. As against Lathrop, the wrong of Lathrop would excuse the lapse of time, as there has been no laches on the part of Derby. Lathrop was brought to account while the estate was still in his possession as executor, and not closed; and as soon as Lathrop absconded proceedings were commenced, and have since been prosecuted with commendable promptness and vigor, to regain the scattered and wasted property of this estate for the purpose of applying it to the payment of this legacy. The same reasons which would prevent Lathrop from interposing the defense of lapse of time and laches against the subjection of this real estate to the payment of this legacy apply to Moores, and are a perfect bar to the same defense in his hands.

The finding of the circuit court, affirming and modifying the order of the probate court, is sustained, with costs, and it will be certified accordingly.

The other Justices concurred.

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HORACE PRATT ET AL. v. DANIEL BURHANS.

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Sale—Retention of title—Fraudulent representations—Evidence—Assignments of error.

1. A contract by which the title to goods is to remain in the owner until they are paid for, or sold in the due course of trade, by the person to whom they are delivered, is valid, and such purchasers take a good title, and those who do not purchase in the due course of trade cannot rely upon the bare possession of their vendor as conclusive evidence of title.
2. Evidence in a replevin suit for goods the title to which the plaintiff claims to have retained until paid for, or sold in due course of trade, of alleged false representations as to the financial standing of the person to whom the goods were delivered, but which the plaintiff testifies he did not rely upon in making such delivery, is immaterial, and should be stricken out on motion of defendant's attorneys.
3. An assignment of error that the judge erred in giving that portion of his charge commencing, "I give you these requests on the part of the plaintiffs," and ending with, "I give you these requests on the part of the defendant," is too general, where twelve requests are involved, the most of which were correct propositions of law.

Error to Shiawassee. (Newton, J.) Argued January 8, 1891. Decided February 6, 1891.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Watson & Chapman, for appellant.

Lyon & Hackleman, for plaintiffs.

GRANT, J. Plaintiffs were partners in business in Binghamton, N. Y., under the firm name of the Binghampton Cigar Company. In November, 1889, Mr. Imhoff, one of the plaintiffs, went to Owosso, Mich., and entered

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into an arrangement with the Owosso Cigar Company, a copartnership composed of a Mr. Chase and a Mr. Totten, by which they agreed to send and deliver to them cigars. Mr. Imhoff testifies that plaintiffs agreed to furnish Chase and Totten all the goods they wanted; the title thereto to be retained in plaintiffs until paid for or sold, and, when sold, the accounts to belong to them. This was denied by defendant's witnesses.

The defendant, Burhans, had indorsed for Chase and Totten for about $6,000. Plaintiffs shipped goods to Chase and Totten, and, shortly after, they turned over all their stock, including the goods furnished by plaintiffs, to defendant, Burhans, and gave him a bill of sale thereof, which defendant claims was a *bona fide* purchase in consideration of his indorsements. Defendant took possession of the goods. Plaintiffs demanded of him possession of the goods then in the stock, and which they had furnished to Chase and Totten. Defendant refused possession, and thereupon plaintiffs brought this suit in replevin, and recovered possession. The trial resulted in a verdict and judgment for plaintiffs.

The case was submitted to the jury upon two theories:

1. That plaintiffs had not parted with the title to the goods, that they were not sold to defendant in the due course of trade, and they were entitled to recover possession.

2. That Chase and Totten made false and fraudulent representations to plaintiffs as to their financial standing, and that therefore plaintiffs might rescind the sale and recover the goods.

It is impossible to tell from the record upon which theory the verdict was rendered. It is very doubtful whether the representations alleged to have been made were in fact or in law fraudulent; but it is unnecessary to determine that question. All the evidence in regard to such representations, or the financial condition of the

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firm, was immaterial. Mr. Imhoff, who made the arrangement on behalf of plaintiffs, testified that he—

"Did not rely upon these representations, but upon his contract; that it was immaterial to plaintiffs what their financial condition was; that the statement made by Chase to him that they could clean up $3,000 to $3,500 did not deceive him, and that he did not rely upon it."

The court therefore erred in not striking out all evidence of these representations upon motion of the defendant's attorneys. That plaintiffs did not rely upon these alleged representations is evident from the further fact that, when Mr. Imhoff demanded the goods of defendant, he only claimed them under the contract. It is therefore unnecessary to discuss separately any of the 43 assignments of error.

It is, however, proper to note that the assignment of error upon the charge of the judge is too general. It is that the judge erred in giving that portion of his charge to the jury commencing, "I give you these requests on the part of the plaintiffs," and ending with, "I give you these requests on the part of the defendant." This involved 12 requests of the plaintiffs, the most of which were correct propositions of law.

The sole issue for the jury was whether or not the plaintiffs and Totten and Chase made a contract by which the title of the goods was to remain in the plaintiffs until they were paid for, or sold in the due course of trade. The defendant did not buy them in the due course of trade; and therefore, if such a contract was made, the plaintiffs were entitled to recover. Such a contract is valid under the repeated decisions of this Court, and we are not concerned with the decisions of other courts upon the subject.[1] Those who purchased in

[1] See *Dewes Brewery Co. v. Merritt*, 82 Mich. 202, and cases there cited.

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the usual course of trade would take a good title. Those who did not purchase in the usual course of trade could not rely upon the bare possession of their vendor as conclusive evidence of title.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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JONATHAN BOYCE v. NELS PETERSON.

Municipal corporations—Taxes—Resolution of council—Meeting of board of review—Notice—Replevin.

1. A designation by the common council of the amount of tax to be raised in a village under How. Stat. §§ 2923-2925, by a fixed percentage, is sufficient. *Fay v. Wood*, 65 Mich. 392 (head-note 5).
2. There is no provision of the statute requiring the evidence of the posting of notices of the meeting of the board of review in a village to be recorded.
3. Replevin will not lie for property seized by the proper officer, under a tax roll and warrant fair upon their face, to satisfy a tax.[1] *Lumber Co. v. Dean*, 73 Mich. 460 (head-note 3).

Error to Muskegon. (Dickerman, J.) Argued January 9, 1891. Decided February 6, 1891.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

F. W. Cook, for appellant.

DeLong & O'Hara, for defendant.

[1] See *Mogg v. Hall*, 83 Mich. 576.

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GRANT, J. This is an action of replevin for 250,000 feet of piece stuff lumber, alleged in the declaration to be of the value of $5,000. The defendant was the collecting officer of the village of North Muskegon, and by virtue of the tax warrant had levied upon this property to collect the tax assessed against the plaintiff for the year 1889. Upon its seizure the plaintiff brought this suit, and obtained possession of the property. Upon the trial the following stipulation was filed:

"1. That plaintiff was the owner of the property described in the declaration in this cause at the time it was seized by the defendant, and at the time this suit was brought, subject to any legal lien which it may be found the defendant had upon it, if any.

"2. The plaintiff was, on the second Monday in April, 1889, the owner of the personal property sought to be assessed for taxes by the assessor of the village of North Muskegon upon the assessment roll of said village that year, and that said personal property was subject to assessment by said village for taxes of said village for that year.

"3. That defendant had possession of the property described in plaintiff's declaration on the 2d day of October, 1890, and had such possession when this suit was commenced, and that such possession was unlawful unless he can justify such possession."

The plaintiff thereupon rested his case. The defendant then introduced in evidence the assessment roll, which showed that plaintiff was assessed on personal property, valued at $80,000, as follows: General tax, $1,000; highway tax, $100; interest and sinking fund, $240,—making a total of $1,340. To this roll was attached the certificate of the board of review, certifying that—

"The foregoing is the assessment roll of said village for the year 1889, and that the said roll was revised, corrected, and approved by us May 9 and 10, 1889."

To it also was attached the certificate of the president and clerk of the village, certifying that the roll had been

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duly examined and approved by the village council at a regular meeting, and that the assessor was ordered and directed to assess the taxes for the current year on the real and personal property as follows, to wit: One and one-quarter of 1 per cent. for general purposes; one-eighth of 1 per cent. for highway and street purposes; one dollar for poll-tax; three mills on each dollar for interest and sinking fund; and also certain sums against certain persons and descriptions of property for certain special assessments. To it was also attached the certificate of the assessor in the usual form, and certifying that the total amount of the taxes assessed upon said roll was as follows: For general purposes, $7,577.04; highway taxes, $756.95; interest and sinking fund, $1,818.55; poll-tax, $469; repairing sidewalks $49.71,—total tax assessed, $10,671.25. There was also attached in proper form the president's warrant to the defendant for the collection of the tax.

The plaintiff offered in evidence the resolution of the village council which corresponds to the certificate of the president and clerk above given, which was the only resolution passed for raising taxes that year. The records of the council do not contain any proof of the posting of notices of the meeting of the board of review of that year. On cross-examination by defendant's counsel, the clerk of the village, who was assessor in 1889, testified that, upon the completion of the roll, he posted the notices of such meeting in the requisite number of public places, but there was no evidence showing the exact time when they were posted.

1. How. Stat. §§ 2923–2925, authorize the common council of any village to raise by general tax upon all the real and personal property sums not exceeding a certain rate per cent. for general expenses, for highway and street purposes, and a poll-tax. None of the amounts

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raised exceeded the percentage authorized by law, but it is insisted that the common council should have specified in the resolution the exact amount raised for each fund. This point is expressly ruled by *Fay v. Wood*, 65 Mich. 390, wherein a designation of the amount by a fixed percentage was sustained.

2. It is next insisted that the assessment roll was void, because there is no evidence showing the length of time the notices of the meeting of the board of review were posted before the day of meeting. The law requires them to be posted not less than five days before the day of meeting. There was no record evidence of the posting of these notices. How. Stat. § 2930. There is no provision of the statute requiring the evidence of the posting of these notices to be recorded. The tax roll was legal upon its face, and it was therefore the duty of the plaintiff to show that these notices were not posted. He did not complete his defense on this point by showing that such proof was not entered upon the records Act No. 195, Laws of 1889, § 85 (3 How. Stat. § 1170*i*4), provides:

"No tax * * * shall be held invalid on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, * * * or on account of any other irregularity, informality, or omission, or want of any matter of form or substance in any proceeding, that does not prejudice the rights of the person whose property is taxed."

Plaintiff does not show or claim that he was injured or prejudiced. He does not claim that he did not know of the time fixed for the meeting. His objection is technical, without merit, and cannot be sustained. But the tax roll was valid upon its face, and therefore replevin will not lie. *Hill v. Wright*, 49 Mich. 229; *Hood v. Judkins*, 61 Id. 575.

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3. The judge directed a verdict for the amount of the tax, viz., $1,471.77. Plaintiff now insists that there was no evidence of the value of the property seized, and that therefore the judgment cannot be sustained, as the property may not have been worth the amount of the tax. This point does not appear to have been raised in the court below. We think the fair inference from the record to be that the case was tried upon the understanding that the property was worth more than the amount of the tax, and that, if verdict and judgment went for the defendant, they should be for the amount involved.

We find no error upon the record, and judgment is affirmed, with costs.

The other Justices concurred.

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PERRY G. FISHER v. JOHN HOLDEN.

Mortgage—Payment—Foreclosure—Equity pleading—Supplemental bill.

1. After accepting a tender made by a mortgagor in *full satisfaction* of the mortgage debt, interest, and accrued costs of a pending statutory foreclosure, as understood by the parties at the time of such acceptance, the mortgagee cannot treat the transaction as a partial payment, and proceed with his foreclosure, and a sale made thereunder will be treated as absolutely void.
2. After filing a bill for an accounting as to the amount due on a mortgage which was in process of foreclosure at law, the complainant tendered to the mortgagee the amount due upon the mortgage, and the costs of the foreclosure, which tender was accepted, but afterwards treated as a partial payment, and the sale made. The facts of such tender and sale were not put in issue by the pleadings, but were shown by the proofs; and on

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an appeal from a decree dismissing complainant's bill it is held that the subsequent transactions by which the mortgage lien was discharged could only be shown by a new or supplemental bill, and the decree is reversed, and the case remanded, with leave to complainant to file such supplemental bill, the proofs already taken to stand as proofs in the case, with leave to put in such other proofs relating to the new matter put in issue as the parties may deem best.

Appeal from Barry. (Hooker, J.) Argued January 9, 1891. Decided February 6, 1891.

Bill to set aside a statutory foreclosure of a mortgage, and to procure a discharge of the lien. Complainant appeals. Reversed, and cause remanded, with leave to file supplemental bill. The facts are stated in the opinion.

C. G. Holbrook (*O. T. Tuthill,* of counsel), for complainant.

Stuart, Knappen & Weaver, for defendant.

LONG, J. This bill is filed for an accounting on a certain note and mortgage given by the complainant, and that the interest may be computed at the rate of 8 per cent., and that, upon such accounting and payment, the mortgage lien may be discharged. The note and mortgage were given April 13, 1875, drawing interest at 10 per cent., due in one year. Certain payments are conceded to have been made. The controversy arises over the amount due on the note and mortgage, the rate of interest at which it is to be computed, and a claimed tender of the amount due.

We shall discuss but a single point. The bill was filed August 2, 1888. The premises were advertised for sale under a statutory foreclosure, the sale to take place on August 4, 1888. On that date, and before the sale, the complainant, by his attorney, tendered to the defendant, mortgagee, the amount which complainant claimed was

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the full amount due to that date. The defendant received the money, put it in his pocket, and then declared that he would not receive it in full discharge of the mortgage, but would indorse it as a partial payment. To this complainant's attorney objected; but the money was retained by the defendant, indorsed on the mortgage, and he proceeded with the sale, bidding in the premises at $88.65, taking a sheriff's deed. On the hearing in the court below the complainant's bill was dismissed. We need not set out the testimony here, but from the testimony returned we are satisfied that the complainant tendered the money in full satisfaction of the mortgage, interest, and costs, and that it was so understood by the parties at the time it was accepted by the defendant. The defendant had no right thereafter to treat it as a partial payment, and proceed with his foreclosure sale. The sale so made would be treated as absolutely void, as the payment operated as a satisfaction and discharge of the mortgage.

The difficulty of the complainant's case, however, is that this tender of payment and acceptance of the money took place after the bill was filed. It is no part of the case made by the bill, though shown by the proofs. It is also claimed by the defendant's counsel on the argument here that these facts might have been rebutted if they had been made issues by the pleadings. There is some force in this position. If these were matters which might be disposed of by an amendment of the bill, we should feel disposed to treat the bill as amended, and decree the lien of the mortgage discharged by the acceptance of the tender, and also that the deed given on the sale be set aside. But these subsequent transactions, by which the mortgage lien became discharged, could only have been met by a new bill, or a bill supplemental to the present. To dismiss the bill now, after the time of redemption

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has expired, would be most inequitable. We shall therefore reverse the decree of the court below, and remand the case. The complainant may have leave to file a supplemental bill in the court below setting out these subsequent transactions, the proofs already taken to stand as proofs in the case, with leave to the parties to put in such other proofs relating to the issue thus made as they may deem best. The complainant will recover costs of this Court.

The other Justices concurred.

CHARLES R. SLIGH ET AL. v. THE CITY OF GRAND RAPIDS AND CHARLES S. WILSON.

Constitutional law—Title of act—Amendment—Municipal corporations—Regrading street—Damages—Assessment.

1. Amendments of a city charter containing no provision giving damages to parties injured by the regrading of streets, which provide for such damages and for their ascertainment and assessment, are within the general purposes of the incorporation act.
2. Act No. 292, Local Acts of 1885, and Act No. 436, Local Acts of 1887, amendatory of the charter of Grand Rapids, in so far as they provide for assessments for the payment of damages sustained by the regrading of streets, are wholly inoperative, in that they fail to provide for notice to the parties who are to be assessed to satisfy the judgments recovered by land-owners entitled to such damages in proceedings provided for in said acts.

Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued December 5, 1890. Decided February 6, 1891.

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Bill to restrain the collection of an assessment to pay damages awarded on account of the regrading of a street. Complainants appeal from a decree dismissing their bill. Decree reversed, and one entered in this Court as prayed. The facts are stated in the opinion.

Smedley & Irwin, for complainants, contended:

1. If amendments or new sections are for a different purpose than that expressed in the title of the original act they are unconstitutional; citing Const. Art. 4, § 20; *Manufacturing Co. v. East Saginaw*, 19 Mich. 295; *Stewart v. Father Matthew Society*, 41 Id. 67; *Church v. Detroit*, 64 Id. 571; *Losch v. St. Charles*, 65 Id. 555; *Ellis v. Hutchinson*, 70 Id. 154.
2. Parties whose property is to be taken by summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax becomes an established charge against them or their property; citing *Thomas v. Gain*, 35 Mich. 156; *Dool v. Cassopolis*, 42 Id. 547; and before complainants' land should be sold, an attempt should be made to collect the assessment out of their personal property; citing *Tompkins v. Johnson*, 75 Mich. 181.
3. Parties whose interests are prejudiced may always take advantage of want of jurisdiction in the court where the injury occurred; citing *King v. Merritt*, 67 Mich. 194, 213; *Kimball v. Cannon*, 59 Id. 290; *Gillett v. Needham*, 37 Id. 143; and the validity of a judgment may be questioned directly or collaterally by parties or strangers if the record does not show jurisdiction; citing *Pettiford v. Zoellner*, 45 Mich. 358.
4. At the common law a person was not entitled to damages on account of the regrading of a street, citing *Pontiac v. Carter*, 32 Mich. 164.

J. W. Ransom (*W. W. Taylor,* of counsel), for defendants, contended:

1. Not having appealed from or in any manner challenged the correctness of the assessment while the roll was under consideration by the common council, complainants are now estopped from questioning its validity, upon the principle that a party will not be allowed to oppose that which by his silence he has led others to believe he favored or acquiesced in; citing *Bank v. St. Joseph*, 46 Mich. 526; *Iron Co. v. Crystal Falls*, 60 Id.

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510; *Evansville v. Pfisterer*, 34 Ind. 45; *Lafayette v. Fowler*, Id. 146.

2. The awards in favor of the several claimants cannot be attacked in this collateral proceeding. The superior court of Grand Rapids cannot sit as a court of review upon its own judgments, and complainants' remedy is by *certiorari*. But if the bill will lie to destroy these claims, and also the fund provided by law for their payment, the claimants must be made parties; citing *Cook v. Wheeler*, Har. Ch. 443; *Sill v. Ketchum*, Id. 423; *Martin v. McReynolds*, 6 Mich. 71; *Titus v. Mining Co.*, 8 Id. 230.

LONG, J. The bill was filed in this cause in the superior court of Grand Rapids, in chancery, by the complainant Sligh and 58 other residents of the city of Grand Rapids, to restrain the city of Grand Rapids and its officers from collecting assessments levied against the property of the complainants.

It appears that in 1886 the city authorities regraded Ellsworth avenue from Bartlett street to East Fulton street, and the common council levied an assessment to pay the costs of said regrade upon a district which they deemed benefited by such regrade, which assessment was paid. In 1887 certain parties living on Ellsworth avenue, who had been assessed for benefits derived on account of said regrade, and who had paid their assessments, claimed damages to their property on account of such regrade, and filed their claims in the superior court of Grand Rapids, by virtue of section 2, tit. 6, of the charter of said city, as amended by Act No. 292, Local Acts of 1885, and Act No. 436, Local Acts of 1887, which provides that in all cases where the grade of any street or alley has been established, and said street or alley has been graded by the proper authorities, and the grade is thereafter altered by the city, the owner of any lot or parcel of land who shall be injured by such alteration of said grade shall be entitled to compensation therefor. These acts also provide for proceedings in the superior

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court of Grand Rapids to ascertain the amount of compensation, to be awarded by a jury to be summoned in the cause in said court, who are empowered to hear, try, and determine such damages in one proceeding, and, when such damages are ascertained, the clerk of that court is to certify the same to the common council, whose duty it then is to define a district in the city which in their judgment is benefited by the improvement out of which such damages arose, and to cause the damages so ascertained to be assessed upon such district, in proportion, as nearly as may be, to the advantage or benefit to each lot. The assessment is to be made, and the amount levied, in the same manner as in the case of other improvements; and all of the provisions of the charter of the city relative to such assessments, and the collection thereof, and the sale, and redemption from sale, are to apply thereto. Such damages, when collected, are to be paid over to the persons to whom the same were awarded.

The claims so presented to the superior court came on to be heard, and were tried as one cause by one jury, and damages were awarded to the claimants in the aggregate of $2,830; whereupon the common council levied an assessment against a district they deemed benefited by such regrade, and are now attempting to collect said damages. The bill is filed to restrain the collection. Complainants claim that these assessments are void for the reasons—

1. That the law under which the parties obtained judgments against the city is unconstitutional.
2. That the judgments so obtained are void.
3. That the assessments are void.

Under the first claim, it is contended by counsel that the amendment of the charter of the city introduces matter foreign to the original object of the charter. The

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charter of Grand Rapids (Local Acts of 1877, p. 158) contained no provision giving parties damages on account of regrading a street. The charter was amended in 1881. Local Acts of 1881, p. 240. This amendment gave parties damages on account of the regrading of streets, and provided that such damages should be taken into consideration by the board of review and equalization at the time of making their assessment roll, and, if the damages exceeded the benefits derived, they should be collected as other taxes, and should be assessed upon all the taxable property of that particular ward. In 1883 the charter was again amended. Local Acts of 1883, p. 516. This amendment provided that the damages on account of any regrade of a street should be estimated by a jury of five freeholders, and that said damages should be assessed and collected in the same manner as other taxes on all the taxable property of the city. The charter was again amended in 1885. Local acts of 1885, p. 85. This amendment provided that the claimants should file their claims against the city in the superior court, and the city attorney should be notified, and it is made his duty to appear for the city; that the issue should be between the claimant or claimants jointly and the city; and that a jury of 12 freeholders should ascertain the damages, which should then be assessed by the common council upon a district deemed by the council benefited by such regrade. This amendment so enlarged section 2 of title 6 of the act that the Legislature in 1887 embodied the amendment of 1885 in seven new sections. Local Acts of 1887, p. 509. The act now stands as in the amendment of 1885, except that the seven new sections contain what was under the act of 1885 incorporated in section 2. It is claimed by counsel that these amendments have enlarged the original provisions of the charter, and that therefore they do not come within the title of the original

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charter of 1877; that the amendments have introduced new matter not embodied within the purposes indicated in the charter amended.

The act of 1877 is an act to revise the charter of the city of Grand Rapids, being amendatory of an act entitled "An act to incorporate the city of Grand Rapids," approved April 2, 1850, as amended by the several acts amendatory thereof. The act of 1850 is an act to incorporate the city of Grand Rapids. The revision of 1877 defines the powers and duties of the common council, and gives them power to lay out and establish, open, make, and alter streets; and in the taking of property for such purposes a jury of 12 freeholders was to be summoned before the city court to assess the damages due to the owners of the property taken. These damages were to be assessed upon the adjacent lots, or by general assessment. It is apparent from the reading of the charter and the various amendments that these amendments, adopted from time to time, are within the general purposes of the act of 1877, under which the city was incorporated. The subject-matter of title 6 of the charter, of which this amendment, and the other amendments of like character in previous years, form a part, relates to and makes provision for public improvements in grading streets, and changing and altering them. It provides the ways and means by which the cost of the work shall be raised. These amendments are germane to the general purpose of the act.

Under the second objection, counsel claim that the complainants in this cause were necessary parties to the proceedings in the superior court when the claims for damages were presented against the city for allowance, and that, not having had their day in court, they should in this proceeding be permitted to attack the claims, and show the proceedings there irregular and void. The stat-

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ute under which the proceedings were had in the superior court provides for notice to the city, who is to defend the action; and whatever damages are awarded the council are to assess upon a district benefited by the improvement out of which the damages arose. This statute does not provide for any notice to the parties who are eventually to be assessed for the amount of the judgments obtained in those proceedings. The proceeding is based upon the theory that, in the regrade, parties whose premises lie adjacent to the street may have been damaged by the cutting down or raising of the grade, and for the recovery of such damages the proceeding is against the city, in the first instance, but giving the council the power to assess the damages over to and collect from the lots benefited the amount of the damages so ascertained. These lots, if lying in the same district which was formed for assessments to pay the costs and expense of the grade, are again assessed for the damages. It is not to be supposed that the common council would fix and determine one district to pay the cost of regrade, being the property benefited thereby, and, when forming a district from property benefited to pay the damages, that other or different territory would be parceled out. It is the same district, and by this statute the property is again assessed.

In the first instance, to pay the costs of the regrade, the board of equalization and review are to assess the same upon all the owners or occupants of the lands and houses within the designated district, in proportion, as nearly as may be, to the advantages which each shall be deemed to acquire by the making of such improvements. In the assessment of the damages by the amendment of 1885 and subsequent amendment of 1887, the council are to ascertain, determine, and define a district which in their judgment is benefited by such improvement out of

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which said damages arose, and cause the same to be assessed in proportion, as nearly as may be, to the benefit each lot or parcel is deemed to acquire by such improvement out of which the damages arose. That is, the parties benefited by the improvement have paid the cost of the improvement, and are then assessed and compelled to pay the damages arising therefrom; and this, without any notice of the claim or an opportunity to defend. If the provisions of the statute allowing the recovery of damages can be enforced against the city for raising or lowering the grade of the street in the making of such public improvements,—a point which we do not decide,—it would be most unjust to allow their recovery against parties who have not had an opportunity to be heard, and who have once been assessed for the costs of regrade. It is not like the costs of improvements to be assessed according to benefits, but it is an amount indefinite and uncertain, and not capable of ascertainment, except upon proper issues and proofs taken, which the parties who are eventually compelled to pay should have an opportunity to meet and defend against. It is true that the city attorney is to appear and defend the city; but the parties who are in the end to pay the damages are not heard. We know of no principle of law which will uphold such a proceeding. If the property of the complainants could be singled out and assessed for these awards of damages, the parties themselves should have had notice before they could be bound by the judgments, and have had an opportunity to defend when the claims were presented for allowance. The amendment of 1885 does not provide for this, and it must be held that the statute is wholly inoperative, and the parties sought to be charged with the payment of such damages cannot be held liable for the payment under these proceedings.

It is very doubtful indeed if the Legislature has author-

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ity. to empower the common council to assess these lots for such damages after they have once paid, according to benefits, for the costs of the regrade.

The decree of the court below, dismissing complainants' bill, must be reversed, and a decree entered here in accordance with the prayer of the bill. Complainants will recover costs of both courts.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. CAHILL, J., took no part in the decision.

MARY MCDONALD v. PATRICK CASEY.

Liquor traffic—Sale to person in the habit of getting intoxicated—Action by wife.

1. A saloon-keeper is not authorized to sell liquor for medicinal use any more than for other purposes, and he cannot excuse a sale made to a man known by him to be in the habit of becoming intoxicated, by the plea that he relied upon the statement of the purchaser that he wanted the liquor for medicine; the Court distinguishing this case from *People v. Hinchman*, 75 Mich. 587, where the defendant was a druggist.
2. On the trial of a suit brought by a wife against a saloon-keeper to recover damages occasioned by reason of the sale of liquor to her husband, the plaintiff denied that she ever consented to such sales during the time covered by her declaration, and the defendant denied that plaintiff ever forbade his selling liquor to her husband, as testified by her, and further testified that plaintiff told defendant several times to let her husband have liquor after defendant had refused so to do. And it is held that under such testimony the court was warranted in instructing the jury that the consent of the wife which would justify unlawful sales must cover the sales for which the action was brought.

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Error to Jackson. (Peck, J.) Argued January 9, 1891. Decided February 6, 1891.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Thomas A. Wilson, for appellant.

Blair, Wilson & Blair, for plaintiff.

. MORSE, J. This is an action of trespass on the case brought in the Jackson circuit court by the plaintiff to recover damages occasioned by the sale of liquor to her husband by the defendant between the 1st day of October, 1887, and the 10th day of January, 1888. She recovered judgment for $350.

The declaration charges that the sales were illegal, in that her husband, John McDonald, was a person in the habit of getting intoxicated at the time the liquors were sold to him, which fact was well known to defendant, and that, on account of such sales, the said John McDonald became intoxicated, and while in a state of intoxication, induced by such liquors sold to him by defendant, shot himself with a revolver, wounding and disabling himself, and was thereby disabled and incapacitated from furnishing said plaintiff and her children the necessary support and maintenance which it was incumbent upon him to render, and, by reason of such intoxication, was discharged from his employment, whereby the plaintiff lost and was deprived of her means of support for herself and her children.

The evidence of the plaintiff tended to show that McDonald came to Jackson in March, 1886. Some six months thereafter he moved into a house within a short distance of the defendant's place of business, who kept a grocery and saloon attached. McDonald acquired the

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habit of drinking soon after he came to Jackson, being a man of temperate habits before that time. The plaintiff testifies that she notified defendant not to sell her husband any liquor in the summer of 1887. She repeated the notice to him or his clerks twice during the fall. The defendant refused to quit furnishing liquor to McDonald, insisting that he had the lawful right to sell it to him. McDonald got most of his liquor at Casey's, and was frequently intoxicated, mostly evenings. He was working on the Fargo shoe contract at the prison, and his wife told Casey that he would be discharged from his work if he kept on drinking. He was discharged December 16, 1887. His wages were $15 per week. After his discharge he drank very hard, so much so that it affected his mind and nerves. On the afternoon of January 10, 1888, having been drinking in the forenoon, he got a quart bottle of brandy at Casey's, of Casey's wife, telling her that he wanted it for bowel complaint. He took the bottle home with him, and, after drinking about half of it, shot himself with a revolver. The ball entered the forehead on the left side, making an open scalp wound. It was some three months after the shooting before he was able to go to work, and some five months before he found employment.

The defendant admitted that McDonald was in the habit of getting intoxicated, but claimed he never sold him liquor except when he was sober, and that he did this with the consent and at the request of the plaintiff, who said her husband would have liquor any way, and she would rather he would get it at Casey's than anywhere else. The defendant furnished the family of McDonald with groceries, and beer and liquor were charged on the same pass-book as the groceries. Defendant showed that he frequently refused McDonald liquor. His wife admitted letting McDonald have the bottle of brandy, but claimed

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that he wanted it for his child that was sick, and that the doctor had ordered it.

Twenty-eight errors are assigned. We shall discuss those only that we deem of sufficient importance to be noticed in the reports. Those not discussed have been considered, however, and found not tenable as errors. We find no errors in the admission or rejection of testimony to the defendant's prejudice.

The court instructed the jury that if McDonald was in the habit of getting intoxicated, and Mrs. Casey knew it, the sale of the bottle of brandy to him was unlawful, even though he said to her that the doctor ordered him to get it for sickness in his family. This is assigned as error, in connection with the refusal of the court to charge that if the jury found that plaintiff sent her husband for the brandy for the sick children, and he stated to Mrs. Casey that he wanted it for that purpose, the plaintiff could not recover for any loss or damage resulting from the drinking of it. Whether or not Mrs. Casey sold this brandy to McDonald in the good-faith belief that he wanted it for his sick children was immaterial, if she knew he was in the habit of getting intoxicated. The case of *People v. Hinchman*, 75 Mich. 590, is not applicable here. Hinchman was a druggist, authorized to sell liquor for medicinal purposes; and we held that he had a right to rely upon the statement made by the purchaser as to the purpose for which the liquor was to be used, if he in good faith believed such statement. But a saloon-keeper is not authorized to sell liquor for medicinal use any more than he is for other purposes, and, where he knows that a man is in the habit of getting intoxicated, and a sale to him is therefore unlawful, he cannot excuse such sale by the plea that he relied upon the statement that it was wanted as a medicine. The court was also requested to charge the jury that, if the

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plaintiff aided her husband to open the bottle of brandy voluntarily, she could not recover for any damages caused by the drinking of it. This the court modified, by inserting "knowing he was going to drink some of it, or encouraged him to drink it." There was no error in such modification.

The case was fairly and clearly put to the jury in this: That the burden of proof was upon the plaintiff to show that she never gave her consent to the sale of liquors to her husband, and, if she did give such consent, she could not recover for any sales made under such consent. But it is claimed by defendant's counsel that the jury were misled by the statement of the court in such charge, that the consent to justify unlawful sales must cover times and sales for which the action was brought, and if the consent was for or limited to different sales, to be made at a time previous to and other than the sales for which recovery was sought, such consent would afford no justification; that there was no testimony in the case justifying such a statement; and that the jury might have got the impression that there was a doubt in the mind of the court as to whether such consent covered the period of the declaration. There was a general denial on the part of plaintiff that she ever consented that liquors might be sold to her husband during the time laid in the declaration, and also a general denial by defendant that plaintiff ever forbade his selling liquor to McDonald. There was also testimony showing beer and whisky charged upon the pass-book for groceries, which the plaintiff used with her husband in trading with Casey. She testified to forbidding Casey selling liquor to McDonald several times, and Casey swears that she told him several times, after he had refused McDonald liquor, to let him have it, as he would get it down town if he did not get it at Casey's. Under this testimony, each denying the evi-

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dence of the other, the court was justified in the statement. The jury might have found that at some times she consented to her husband's getting drink at Casey's, and yet found that, when he was on his drinking spree before he was discharged, plaintiff forbade the sale of any more liquor to him, and warned Casey that selling him more would result in his discharge from employment; and there was testimony, if believed, to justify such findings.

A great deal of fault is found with the charge of the court. We are not, however, cited to any positive error in his statement of the law, but the burden of the complaint seems to be that the court in some respects did not clearly enough apply the law to the facts, and in other parts of the charge he went too much into detail in such application; and the counsel for the defendant, after making one of these objections, says in his brief:

"Had the charge been to a jury of lawyers, it might not be subject to this criticism, but to a jury of laymen, possibly prejudiced more or less against the business of selling intoxicating drinks, it was not sufficiently guarded to protect the rights of defendant."

We think the instructions to the jury, while dealing with more issues than was perhaps necessary, were unusually clear and correct. We fail to notice where the defendant has been injured by this judgment of $350 against him. The defendant admitted that he knew McDonald was in the habit of getting intoxicated, and yet he kept on selling him liquor whenever he found him sober. Every glass sold to him under these circumstances was unlawful, and a damage to the wife. His only defense in this civil action (and he could have had none in a criminal suit) was that the wife had consented to the sales. The jury found against him on this point, and not without reason. The verdict cannot be said to have shown prejudice. It was not disputed that McDonald

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had employment at $15 per week, which he lost by drunkenness caused by liquor obtained in part at Casey's. Liquor caused him to shoot himself, which laid him up for three months longer. Casey's own evidence shows that McDonald supported his family, and bought his groceries of him, while he was at work. It does not look to us, upon a careful examination of the whole record, that the jury could have been very much prejudiced against the sale of liquor, considering the amount of their verdict, and we fail to find any action on the part of the trial judge to the prejudice of the defendant.

The judgment is affirmed, with costs.

The other Justices concurred

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91 331

HENRY LINDNER ET AL. v. GUSTAVE HINE.

Attorney and client—Judgment—Payment—Estoppel—Lien for services.

1. The receipt by a plaintiff of the money due upon a judgment rendered in his favor, and its discharge by indorsing a satisfaction thereof upon an execution issued for its collection, estop him from denying the authority of the attorneys to act for him in its procurement, and, if their original employment is not shown, such acts are a full and complete ratification of their acts and services in obtaining the judgment.
2. The lien of an attorney at law attaches to the money payable to his client upon a judgment if it is the proceeds of the attorney's labor and skill, and to moneys received by the client by way of a compromise of such judgment, who, if he settles the case after judgment, so as to deprive the attorney of his costs and fees, is liable to him in the proper action. 1 Amer. & Eng. Enc. Law, 970, 971; *Weeks v. Circuit Judges*, 73 Mich. 256; *Kinney v. Tabor*, 62 Id. 517: *Potter v. Hunt*, 68 Id. 242.

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3. Requests to charge appearing in the printed record, but not in the bill of exceptions, which does not show that any exceptions were taken to the refusal of the court to give them, nor that the attention of the court was called to such requests, cannot be considered.

Error to Bay. (Cobb, J.) Argued January 9, 1891. Decided February 6, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Simonson, Gillett & Courtright, for appellant.

Lindner, Porter & Haffey, plaintiffs, in *pro. per.* (*A. McDonell,* of counsel).

CHAMPLIN, C. J. Schucker & Hopp were the owners of a stock of liquors, and gave Gustave Hine a chattel mortgage thereon. Afterwards they obtained a policy of insurance upon the stock from the People's Insurance Company, the loss, if any, payable to Hine, as his mortgage interest might appear. A fire occurred, which consumed the property insured. The plaintiffs had been the attorneys of Schucker & Hopp in some litigation which they had before that time had, and the plaintiffs made out the proofs of loss. The insurance company denied liability, and Schucker & Hopp thereupon assigned their claim under the policy to Gustave Hine; and the plaintiffs then brought suit against the company in Hine's name, and recovered a judgment for $1,066. Hine afterwards settled with the company by discounting some $91, and received the balance of the judgment, and discharged it of record.

The settlement was made and the money received without the knowledge or consent of the plaintiffs, who soon thereafter presented to Hine their bill for services and for $14.75 for costs, which they had paid to the clerk of

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the court in the suit. Hine denied all liability to them, and refused payment. Plaintiffs brought suit before a justice of the peace, where the case was tried before a jury, who found for the defendant. Upon appeal to the circuit the cause was tried, and another verdict rendered for defendant. A new trial was granted, and under the instructions of the court the jury returned a verdict for the plaintiffs. Defendant assigns error upon the refusal of the court to charge as requested by the defendant and upon the charge as given.

Upon the trial the plaintiffs introduced testimony which tended to prove that Mr. Hine employed them to bring the suit and perform the services sued for, and that he also employed Mr. Lyon, of the firm of Shepard & Lyon, to assist them in the preparation and trial. The defendant, Hine, introduced testimony tending to prove that he never employed plaintiffs to perform any services or bring any suit against the insurance company for him, or in his name; that one of the plaintiffs met him on the street, and told him that suit had been commenced, and said to him: "Hine, you had better get Lyon to do the work in that insurance case;" and that he afterwards employed Shepard & Lyon, and paid them for their services. He also introduced testimony tending to prove that Schucker & Hopp employed plaintiffs to commence suit in Hine's name; that they were interested in the insurance, and in having the amount collected, as it would reduce their indebtedness to Hine that much.

There appears in the printed record what purports to be the defendant's requests to charge, but they are not contained in the bill of exceptions, and it does not appear that they were called to the attention of the court, nor does the bill of exceptions show that any

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exception was taken to any refusal to charge as requested. These cannot, therefore, be considered.

The declaration was upon all the common counts in *assumpsit* before the justice, and the following bill of particulars was filed, viz.:

"Services in suit of *G. Hine vs. The People's Insurance Company of Pittsburgh*	$150 00
"Costs paid Wm. Gaffney, county clerk, in *Hine vs. People's Insurance Co.*	14 75
Total amount	$164 75."

The verdict rendered by the jury was for $164.75, which appears to be the precise amount claimed.

The court instructed the jury as follows:

"There is no denial in the case that Lindner, Porter & Haffey were managing that insurance case, and there is no denial that Mr. Hine knew that they were managing it. There is no pretense anywhere that he objected to their managing it; and he knew that the suit was commenced; that he had a suit in this court against the insurance company, in which Lindner, Porter & Haffey were his attorneys. It is denied that he ever employed them to do it so as to make himself liable to pay them their fees, but it is not denied that he knew they were doing it. Neither is it denied, but it is claimed on all hands, that Schucker & Hopp knew that they were doing it. Now, they were doing it rightfully. There is no pretense anywhere that they were doing it wrong,—that they were representing a name there which they had a right to represent. They were not doing a wrong to Mr. Hine, then, in managing that suit, and prosecuting it to completion. They were not doing any wrong to Mr. Hine. The suit went on to completion under their management, and judgment was rendered, and execution issued,—a judgment was rendered which produced the money, at any rate. Now, I say to you as a matter of law that as soon as that judgment was rendered, whoever might be the owner of the judgment, Hine or Schucker & Hopp, Lindner, Porter & Haffey had a lien upon it for the amount of their fees and disbursements in the case. It was money that they had a lien upon. I almost

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said a mortgage, but it is not technically a mortgage, but a lien on it, which entitles them to so much of that money as they are entitled to, so that whatever they were entitled to collect from Schucker & Hopp or Hine they were entitled to take out of the money that was received upon that execution."

He also instructed them that it was in evidence that Mr. Hine received the money upon that judgment, and that in so doing he received money to which the plaintiffs were entitled, to an amount which the jury should find their services in procuring the judgment were reasonably worth, and the disbursements they had made, if any, for costs in the case, and that the jury must find a verdict for the plaintiffs for such amount. No objections were made to the introduction of testimony upon which the foregoing charge is based. It was admissible under the common counts in *assumpsit*, and, had objection been made, the bill of particulars could have been amended.

There was no error in the instruction of the court. This action is not between the attorneys for the prevailing party and the judgment debtor, and consequently the question of notice to such debtor does not arise in the case. The question is one between attorney and client. The undisputed fact that Mr. Hine received the money for which judgment was rendered, and discharged such judgment by indorsing a satisfaction thereof upon the execution, estops him from denying the authority of the attorneys in acting for him in procuring such judgment. If no original employment had been proved, this act would be a full and complete ratification of the acts and services performed by the attorneys in obtaining the judgment. He cannot take the money due by virtue of the judgment and deny the authority of the attorneys to procure such judgment for him. The relation is established by his own act.

The lien of the attorneys attaches to the fruits of the

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judgment. It attaches to the money payable to the client if it is the proceeds of the labor and skill of the attorneys. It attaches also to moneys received by way of compromise by the client in the cause, for the money is regarded as the fruit of the attorneys' labor and skill. And if the client settles the case after judgment, so as to deprive the attorneys of their costs and fees, the latter have an action against the former. 1 Amer. & Eng. Enc. Law, pp. 970, 971, and cases cited; *Weeks v. Circuit Judges,* 73 Mich. 256; *Potter v. Hunt,* 68 Id. 242; *Kinney v. Tabor,* 62 Id. 517. Had the money been paid to the plaintiffs, instead of to the defendant, they would have had the right to retain their costs and fees from it by virtue of their lien; and when the defendant received the money upon the judgment, which had been obtained by their labor and professional services, he received money which in equity and good conscience belonged to the plaintiffs.

We think the circuit judge might also have instructed the jury that, the defendant having received and receipted for the money due upon the judgment, he was estopped to deny that the relation of attorney and client existed between himself and the plaintiffs; that by so doing he ratified their acts in bringing suit and prosecuting it in his name and for him, and was liable to pay for those services what they were reasonably worth.

The court further instructed the jury upon the question as to the services of Mr. Lyon as follows:

"Now, it is claimed here upon one side that they did request the assistance of Mr. Lyon, and if that is true, and if that is correct, and it shows that there should be a rebate upon that account, that will make a difference in the amount that you will allow Lindner, Porter & Haffey for fees. But it is claimed, on the other hand, that Mr. Lindner never requested that Mr. Lyon should be brought in the case at all, but that he said he had

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confidence in the case, and did not need any help, and did not want it, but that Mr. Hine himself suggested putting Mr. Lyon in the case, and it was done on his motion. If that is true, then no rebate should be made."

It may be inferred from the amount found by the jury in favor of the plaintiffs that they found the facts as testified to by plaintiff Lindner. There was no error in permitting the witness Lindner to testify in rebuttal.[1]

The judgment must be affirmed.

The other Justices concurred.

ALFRED L. MILLARD v. JEROME TRUAX.

Assault—Evidence—Provocation—Mitigation of damages.

1. A defendant cannot give in evidence in mitigation of damages for an assault the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction.
2. To entitle the defendant in an action for assault and battery to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the feelings and passions excited by it. *Coxe v. Whitney*, 9 Mo. 531; *Lee v. Woolsey*, 19 Johns. 319.

Error to Lenawee. (Lane, J.) Argued January 13, 1891. Decided February 6, 1891.

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[1] His testimony was to the effect that plaintiffs did not consent to and had no knowledge of the settlement of the insurance matter, and the payment of the money to defendant, Hine.

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Trespass. Defendant brings error. Affirmed. The facts are stated in the opinion.

Watts & Smith (*Robert E. Frazer*, of counsel), for appellant.

F. B. Wood and *J. E. Bird* (*Weaver & Bean*, of counsel), for plaintiff.

LONG, J. This is an action of trespass for an assault and battery. Plaintiff had verdict and judgment for $400. Defendant brings error.

The plaintiff is 75 years of age, and an attorney at law. He met the defendant in the hall of the court-house in Adrian, Lenawee county, where the parties reside. It appears that some litigation had been going on between them, and the plaintiff, on the morning of the claimed assault, accosted the defendant, and told him he had paid the money in on the decree. Plaintiff had filed a bill to redeem from a certain mortgage, and the decree granted him the right to redeem upon the payment of a certain amount, which he had paid to the register of the court in Ingham county. Upon being thus accosted, the defendant replied, "Yes, damn you, you have robbed me out of that farm, and, damn you, I will be revenged." He thereupon struck the plaintiff with his fist, knocking him down, causing a severe contusion on the cheek near the eye. This was the plaintiff's claim. On his cross-examination he was permitted to testify that before that time he had obtained a decree against the defendant for the possession of the farm; that he was compelled to go to the court, and take proceedings to enforce it; that he made complaint against defendant for contempt of court in not obeying the

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decree, and the court pronounced the defendant guilty and committed him to jail.

The defendant was called as a witness, and testified that he was imprisoned for such contempt for some six months; that when he was first shut up the sheriff gave him for a time the limits of the town. He was then asked by his counsel:

"*Q.* Now, did or did not Mr. Millard come up there and order the sheriff to shut you up entirely?
"*A.* He made the order, the sheriff told me. I did not hear it, no more than the sheriff told me."

Plaintiff's counsel moved to strike this testimony out, and it was so ordered. The following question was then asked:

"*Q.* Were you shortly after that shut up and kept confined?
"*A.* Yes, sir; it injured my health."

This was objected to as immaterial, and the objection sustained. This is claimed as error. There was no exception taken to these rulings, and for that reason they cannot now be considered; but, even if there had been proper exceptions, the rulings were correct. Such testimony was wholly incompetent and immaterial so far as the defense was concerned. It could not have been allowed even in mitigation of damages. Its admission would rather have tended to aggravate the damages. It was at a time long prior to the assault. The imprisonment itself, it appears, was by order of the court for contempt. If the defendant had been wronged by such imprisonment, he certainly had no right to revenge it upon the person of the plaintiff. A defendant cannot give in evidence in mitigation of damages for an assault the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction. To entitle the defendant to give evi-

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dence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it. *Coxe v. Whitney*, 9 Mo. 531; *Lee v. Woolsey*, 19 Johns. 319.

The only other error assigned relates to the charge of the court. It is conceded that the court correctly stated the rule to the jury upon the question of exemplary damages; but it is urged that, having stated what circumstances would authorize exemplary damages, he should also have stated in the same connection what circumstances would mitigate or reduce the exemplary damages. No instructions to the jury were asked by the defendant, and the attention of the court was in no way called by counsel to any fact or circumstance which would have mitigated the damages, and no fact or circumstance is pointed out here, and the record does not disclose any. It appears by the record to have been a cruel, wanton, and malicious assault, committed without any immediate provocation, for the purpose of revenge for some claimed previous wrong. It was committed upon an aged and infirm man, who had pleasantly accosted him that morning. We see no error in the case.

The judgment must be affirmed, with costs.

The other Justices concurred.

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FREDERICK B. WOOD, ADMINISTRATOR, ETC., ET AL. v. VICTOR H. LANE, CIRCUIT JUDGE OF LENAWEE COUNTY.

Pleading—Amendment—Substitution of parties—Life insurance—Death of beneficiary.

An amendment substituting the heirs of a member of a mutual benefit association,—who are entitled to the insurance agreed to be paid in his certificate by reason of the death of their mother, who was named as a beneficiary, prior to their father's death,—as plaintiffs in a suit brought in the name of her administrator to recover said insurance, is permissible.

Mandamus. Submitted January 14, 1891. Granted February 6, 1891.

Relators applied for *mandamus* to compel respondent to permit an amendment substituting certain of them as plaintiffs in the place of their co-relator, Wood, in a suit brought to recover life insurance to which they were entitled as heirs of their father. The facts are stated in the opinion.

A. L. Millard and *J. E. Bird,* for relators.

Watts & Smith, for respondent.

A. B. St. John and *C. M. Barre,* for defendant in original suit.

MORSE, J. The deceased, Frank L. Silvers, at the time of his death, February 18, 1889, was insured in the Michigan Mutual Benefit Association of Hillsdale, Mich., in the sum of $3,000, the certificate of such insurance agreeing and promising to pay, 60 days after his death,

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if certain conditions were performed, the said sum of $3,000 to "Josie Silvers (wife), heirs, administrators, and assigns." Josie Silvers died February 17, 1889, one day prior to her husband's decease. They left no issue. Josie left a will devising and bequeathing all her property to Frank, her husband. Frank died intestate. Thomas Kyle was appointed administrator of Frank's estate, and found this certificate of insurance among Frank's effects.

Acting under the advice of counsel in the collection of such insurance, and supposing that the money must be collected in behalf of Josie's estate, and then paid over by such estate to Frank's estate, under the will of Josie, he procured the appointment of Frederick B. Wood as administrator with the will annexed of Josie's estate. Wood made proofs of the death of Frank, presented them to the insurance company, and demanded payment of the certificate, which was refused. He thereupon brought suit against such company as administrator of Josie's estate. After the suit was at issue, it was learned by a recent decision of this Court (*Mich. Mut. Ben. Ass'n v. Rolfe*, 76 Mich. 146), that the suit was misconceived; that the death of the wife, she dying before the husband, terminated her contingent interest in the insurance, and that the suit should have been commenced in the interest of Frank's heirs direct, as the estate of Josie was not concerned in said insurance. Thereupon these relators joined in a petition to the circuit judge of Lenawee county, in which county the original suit was planted, praying for an order striking out the name of Frederick B. Wood as administrator, etc., as plaintiff in said suit, and that the heirs at law of said Frank L. Silvers, deceased, be inserted as plaintiffs in said suit, and that said suit proceed in their names. This petition the circuit judge denied. We are asked to issue a writ of

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mandamus directed to said circuit judge, commanding him to enter the order prayed for in said petition, and to vacate his order denying the same.

It is contended that *mandamus* will not lie to review the exercise of judicial discretion, and that in this case the respondent denied the proposed amendment in the proper exercise of such discretion. But this is a case where the right of action will be lost unless the amendment is permitted, and great injustice be done to the heirs of Frank Silvers, who cannot be said to be responsible for the mistake made in the name of the plaintiff in the commencement of the action, and we cannot believe that the learned circuit judge would have refused such amendment had he supposed he had power to make it. The point is made here, as it undoubtedly was before him, that the allowance of this amendment would permit the introduction of a new and distinct cause of action against the insurance company. If so, the circuit judge would have no authority to grant it. But we do not think that it introduces any new cause of action. The real plaintiffs in the action, as commenced in the first place,—the persons to be benefited by this insurance certificate,—were the heirs at law of Frank Silvers. If the policy had vested, as at first supposed, in Josie Silvers before her death, and it was a part of her estate, under her will it descended to Frank Silvers, her husband, and, he dying intestate, it then went to his heirs at law. Under our rulings it never vested in Josie Silvers, but belongs to the heirs at law of Frank, so that the real persons interested and sharing the money to be obtained from it are the same in both cases, to wit, the heirs at law of Frank Silvers. In both cases it is really a claim of these heirs against the insurance company, and the only difference is in the mode of its transfer to them,—a mere technicality in the legal steps necessary to be

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taken to collect it. Clearly in this case the money due upon this insurance certificate is payable to the heirs of Frank L. Silvers, and it would be a denial of justice not to permit this amendment. *Mich. Mut. Ben. Ass'n v. Rolfe*, 76 Mich. 152–154. If the real parties remain the same, and the change is of the nominal parties only, the amendment is permissible. *Morford v. Dieffenbacker*, 54 Mich. 593; *Kimball, etc., Manfg. Co. v. Vroman*, 35 Id. 310; *Merrill v. Kalamazoo*, Id. 211; *Kinney v. Harrett*, 46 Id. 87; How. Stat. § 7631 *et seq.* The amendment is in the furtherance of justice, and the insurance company cannot be surprised by it; neither will it be deprived of any substantial or essential rights in the premises, in my opinion.

The writ will be granted, but without costs.

The other Justices concurred.

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THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY v. GEORGE D. REED.

Insurance—Misrepresentations of agent—Rescission by assured—Premium note.

A railroad switchman applied for insurance to an agent of a life insurance company whose powers were in no way restricted by the printed application, which the agent filled out, and a copy of which was delivered to the applicant with his policy. The applicant correctly stated to the agent his occupation, which rendered him uninsurable under the conditions of the policy, and the agent, in filling up the application, misstated such occupation, so as to avoid such conditions. And it is held that the assured, on discovering the fraud, had the right to rescind the contract of insurance, and show the facts as a

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defense in a suit by the company upon a note given for the premium.

Error to Lenawee. (Lane, J.) Argued January 14, 1891. Decided February 6, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. C. Winne, for appellant, contended:

1. If what defendant claims with regard to the misstatement of his occupation is true, it was no fraud upon him, but upon the company, which would have been estopped to deny liability, the application having been prepared by its agent, and the defendant not knowing of the false representations; citing *Pudritzky v. Knights of Honor*, 76 Mich. 428; *Temmink v. Insurance Co.*, 72 Id. 388; *Baker v. Insurance Co.*, 70 Id. 199; *Kitchen v. Insurance Co.*, 57 Id. 135; *Insurance Co. v. Lewis*, 30 Id. 41; *Insurance Co. v. Fay*, 22 Id. 467; *Insurance Co. v. Throop*, Id. 159; *Insurance Co. v. Olmstead*, 21 Id. 253; *Insurance Co. v. Hall*, 12 Id. 213.

2. The statement with reference to defendant's occupation, if incorrect, was immaterial. A representation is material when its truth or falsity would probably and naturally have induced the insurer either to enter into the contract or refuse to do so; citing *Barteau v. Insurance Co.*, 67 N. Y. 595; and under the clause in the policy relating to the occupation of the assured, it is not his previous or present business, but his future calling, that affects the risk; hence it could have been no fraud on defendant, whatever his occupation was stated to be in the application, for by accepting the policy with a true copy of the application annexed he was plainly informed of his rights and obligations thereunder; citing *Insurance Co. v. Olmstead*, 21 Mich. 252; *Van Buren v. Insurance Co.*, 28 Id. 399; *McIntyre v. Insurance Co.*, 52 Id. 188; *Cleaver v. Insurance Co.*, 65 Id. 527.

3. Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law will leave him where he has been placed by his own imprudent confidence; citing

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Slaughter v. Gerson, 13 Wall. 379; *Rockafellow v. Baker*, 41 Penn. St. 319; *Hobbs v. Parker*, 31 Me. 143; *Brown v. Leach*, 107 Mass. 364.

Watts & Smith, for defendant.

McGRATH, J. This is an action of *assumpsit*, brought in justice's court, upon a note given by defendant for a portion of the second semi-annual premium on a policy of insurance issued by plaintiff upon the life of defendant. Defendant, with his plea, gave notice that the signature to the note was obtained by fraud, and that the note was without consideration.

Defendant was a switchman in the employ of the Lake Shore road, at Adrian. One Vanderburg, an agent of plaintiff, who resided at Adrian, and had known defendant for some time, solicited the insurance, took the application, delivered the policy, and took some cash and three notes for the first year's premium. The policy was dated November 28, 1888. Two of the notes were paid, and defendant refused to pay the third, which matured about September 1, 1889. The application was filled out by Vanderburg, and presented to defendant for signature. Defendant insisted that Vanderburg had been acquainted with him for years, knew all about his occupation, and filled out the application largely from his (Vanderburg's) knowledge of the facts; that no questions were asked as to occupation, and defendant did not read the application before signing it, but relied upon Vanderburg; that defendant was a switchman engaged at the yard, and was upon and about trains as they were being made up; that the policy, with a copy of the application attached, was delivered to him in January, 1889; that some days afterwards, in examining the policy and copy of the application, he discovered that his occupation was given as "assistant yard-master, does no switching, don't go near trains;" that thereupon he called Vanderburg's attention

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to this misstatement, and told him that he was not a yard-master, and that he did switching, and did go near trains; that thereupon Vanderburg took the policy for the purpose of sending it to the company for the purpose of correction; that afterwards Vanderburg returned the policy to defendant, saying that the change had been made, and that it was all right; that, supposing that the application had been changed to conform to the facts, defendant did not examine it for some time, but when he did finally examine it he found that it read "assistant yard-master, don't couple cars or do switching;" that upon this discovery defendant saw Vanderburg, accused him of again misrepresenting defendant, and told him that he (defendant) was not protected by the policy, and tendered it back to Vanderburg; that Vanderburg claimed that he had no right to receive it; that several conversations were had with Vanderburg, who finally advised him to send it back to the company, which he did on or about September 6, 1889. The application contained the usual printed clause, declaring—

"That the above are fair and true answers to the foregoing questions, and I hereby agree that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers * * * shall violate the policy, and forfeit all payments made thereon."

The policy provides in terms that "no agent has power to change the terms of this contract," and contains the further provision that—

"The person whose life is hereby insured shall not engage in blasting, * * * or be regularly employed * * * as a mariner, engineer, fireman, conductor, or laborer in any capacity * * * upon railroad trains."

The plaintiff requested the court to charge the jury as follows:

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"1. You are directed to find a verdict for the plaintiff for the amount of principal and interest of note in issue.

"2. Even should you find that the agent, Vanderburg, wrote wrongfully the answers in the application for insurance by Reed, which untruthful answers were known to him, Reed, or not, this fact would not relieve the plaintiff from the obligation fixed in the policy; and, in case he should have died during any of the time, prior to the time fixed for the payment of the note, plaintiff would be obliged to pay the wife of insured $1,000, and hence defendant is liable on his note.

"3. There is no evidence before you that you can consider that will warrant you to find a verdict for the defendant."

The court refused these requests, and instructed the jury as follows:

"You are instructed, as a matter of law, that if Mr. Reed, in answering the question as to what his occupation was, said to Mr. Vanderburg that he was engaged in the yard there as a switchman, making up trains, and doing general work about the yards there in connection with trains, and Mr. Vanderburg put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars or do switching, then, I think, gentlemen of the jury, that that would be such a misstatement or fraud practiced upon the insured here as that he would be entitled to have these proceedings rescinded; that is, the policy and notes set aside and held for naught, from the time at least when such rescission should take place upon his part. * * * You will take all these circumstances into consideration; and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it, and the company was bound by it, then he could not assert the defense which he is seeking to assert here; or if the agent, Mr. Vanderburg, put into this application the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course, Mr. Reed would not have the right to assert that by way of defense to this note, because, if there was any fraud then, it would be the fraud of the defendant, and not the fraud of the company or its agent."

The jury brought in a verdict of no cause of action.

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We think the court was correct, both in the refusal to give the plaintiff's requests and in the instructions given. The application here contained absolutely no restriction upon the powers of the agent. The applications are usually filled in in the handwriting of the agent, as was done in this case; and agents are nowhere in the blank prohibited from filling in the application. Indeed, on the face of the printed blank, the very first sentence is as follows: "This blank must be filled by the agent;" and again, in a blank left at the head of the printed blank, is the following:

"Agents will note here anything specially desired regarding the policy applied for, and to whom and where it is to be sent."

Although these appear in what might be termed the "caption" to the application, and not in the body of the application, yet to a person not familiar with these blanks it would be misleading if it is intended that the application is to be filled out by the applicant. Again, in the body of the application, is the following:

"N. B. Agents will be particular to see that all questions in the application are fully answered, particularly whether the age and date of birth agree."

Again, in the general printed declaration in the application, is the following:

"It is hereby agreed that the policy shall not be in force unless the premium is actually paid to the company or its authorized agent."

At the bottom of the application are the following printed words: "Approved and recommended by (T. W. Vanderburg) agent;" the name of T. W. Vanderburg being written in in this case. At the head of the filing blank, upon the back of the application, occurs the following: "Agents will not fill up this filing." Vander-

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burg received the premium in notes and cash for the company, and must be considered the duly-authorized agent of the company. Had the blank been presented to and read over by the insured before it was filled in, there is nothing contained in it which did not warrant his acting with the agent, just as he claims he did. A copy of the application was attached to the policy, and delivered to defendant. The policy contains this provision: "No agent has power to change the terms of this contract;" and also the following:

"For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, a copy of the application upon which this policy is based is hereto attached."

It must be conceded that the representation in the application as to the occupation of the insured is untrue, and, if made by the defendant, it would be a good defense to an action upon the policy. The court instructed the jury that, if made by the defendant, it would be no defense to the action upon the note. The jury found that it was not the act of the insured, but of the agent of plaintiff. It has been repeatedly held that, when an application is reduced to writing by an agent of the insurer, upon oral statements of the applicant, the conversation between the agent and the applicant at the time of putting it in writing is admissible as bearing on the question of the actual contents of the paper, or the representations of the insured; and that, when it appears that the insured fairly and correctly informed the agent as to any fact, and the agent unskillfully, carelessly, or fraudulently misrepresented the insured as to that fact, such unskillfulness, carelessness, or fraud is the unskillfulness, carelessness, or fraud of the company,

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and is no defense to an action on the policy. *Mich. State Ins. Co. v. Lewis*, 30 Mich. 41; *North American Fire Ins. Co. v. Throop*, 22 Id. 146; *Crouse v. Insurance Co.*, 79 Id. 249, and cases cited. In *Aetna, etc., Ins. Co. v. Olmstead*, 21 Mich. 252, Mr. Justice COOLEY says:

"The agent of the insurance company assumed to have all the requisite knowledge for preparing the proper papers, and volunteered to make them out. He had all the necessary information for that purpose, and nothing was concealed from him. If the application is not in due form, and if it fails to give all the information called for, it must be either because the agent was too ignorant of the business to be properly intrusted with the agency, or because he was so negligent or reckless that he did not trouble himself to draft them correctly, or, lastly, because he was disposed to take Olmstead's money on the fraudulent pretense of giving him indemnity when he knew he was giving none whatever.

"The general rule undoubtedly is that, in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void. * * * The forms and requirements of different insurers are different, and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of

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the cases, in giving a worthless policy for the money they receive."

In the present case, upon the discovery of the fraud defendant had the right to rescind the contract. He was not bound to subject the beneficiary named in the policy to a lawsuit after his death, to determine the validity of the policy, especially as in that event his testimony would be wanting. Again, it is not claimed here that the company had actual notice of the facts as to defendant's occupation, but that it had constructive notice only; but it must be remembered that a copy of the application was attached to the policy, and delivered to the defendant, in which case, under the express provisions contained in the policy relating to the correction of "unintentional errors or omissions" in the application, it was defendant's duty to call attention to this misrepresentation, otherwise the defendant might have been chargeable with a fraud upon the company; for while the company would not be able to avoid a policy by reason of the rule of law that its agent's wrong was the company's own wrong, of which it could not take advantage, it would be otherwise had the insured conspired with the agent, or had the insured been fully informed as to the representations made, and the contents of the application, and neglected to bring it to the attention of the company.

The judgment is affirmed, with costs of both courts to defendant.

The other Justices concurred.

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TRUE W. CHILDS ET AL. v. EDWARD O'DONNELL.

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Sale—Warranty—Option to return goods.

1. There is a wide difference between an option given to the buyer to return the goods if not satisfactory and a warranty of quality. The latter is continuing, and runs with the goods; but the former must be exercised within a reasonable time after the receipt of the goods, and their retention after the expiration of such reasonable time must be regarded as an acceptance, unless the option is extended in clear and unmistakable language.
2. An option given to a purchaser to return goods if not satisfactory on trial does not extend to subsequent orders and invoices of goods, unless repeated with each order, or unless general language was used covering *all* orders or sales.

Error to Kent. (Grove, J.) Argued January 15, 1891. Decided February 6, 1891.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Peter Doran, for appellants, contended:

1. Defendant could not be allowed to keep the goods for an unreasonable time, and until they were out of season, and then repudiate the sale and return the goods. These goods were retained by defendant for from two months to over a year, which was an unreasonable time; citing *Roebling's Sons Co. v. Hematite Co.*, 70 Mich. 346; *Farrington v. Smith*, 77 Id. 550; *Crippen v. Bope*, 38 Id. 344; *Boothby v. Scales*, 27 Wis 638; *Paige v. McMillan*, 41 Id. 341; nor can defendant return a portion of any one bill of goods and retain the rest; citing *Mansfield v. Trigg*, 113 Mass. 351; *Morse v. Brackett*, 98 Id. 205; *Carney v. Newberry*, 24 Ill. 203; *Clark v. Baker*, 5 Metc. 452.
2. When goods are bought as corresponding to sample, and so appear, a reasonable delay in examining them is proper; but, when they are not supposed to conform to sample, great promptness on the part of the vendee is required in making such examination, and in rescinding the sale with as little delay as the

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usual methods of business will permit; citing *Farrington v. Smith*, 77 Mich. 550.

3. The plaintiffs were suing for bills of goods sold subsequent to January 1, 1888, while defendant seeks to recoup damages, not only for the goods sold under the agreement, but also for goods sold under other prior contracts. This conflicts with the well-known rule that the defendant can only recoup those damages which spring out of the same contract or transaction upon which the suit is brought; citing *Ward v. Willson*, 3 Mich. 1; *Molby v. Johnson*, 17 Id. 382; *Holland v. Rea*, 48 Id. 218; *Morehouse v. Baker*, Id. 335; *Mimnaugh v. Partlin*, 67 Id. 391.

4. By the dissolution of the firm of Fuller, Childs & Co., and the organization of that of Childs, Lee & Dunlap, a change was made in the parties with whom defendant was dealing, of which fact he had due knowledge. If he had a right to recoup damages as against the old firm, he should have made his claim then, unless he had already slept on his alleged rights for an unreasonable time. These two firms were in law as distinct as two persons, and the defendant could not hold the plaintiffs responsible for any alleged default of some one else, or some other firm. Each change of partners, whether by the addition of a new member or the death or retirement of an old one, is a dissolution as to all of the partners, and if the business is continued it is a new partnership, whet er the name be the same or not. No matter how numerous the changes without apparent break in the continuity of business, at each change an existing firm dissolves and a new one is formed; citing 2 Bates, Part. § 570; *Ross v. Cornell*, 45 Cal. 133; *Waller v. Davis*, 59 Iowa, 103; *Abat v. Penny*, 19 La. Ann. 289; *Mudd v. Bast*, 34 Mo. 465; *Morss v. Gleason*, 64 N. Y. 204; *Horton's Appeal*, 13 Penn. St. 67; *Peters v. McWilliams*, 78 Va. 567.

Eggleston & McBride, for defendant, cited no authorities, their brief being confined to a discussion of the evidence.

McGRATH, J. Childs, Lee & Dunlap, plaintiffs, brought *assumpsit* for the price and value of several invoices of boots and shoes sold defendant, at the dates, and aggregating the amounts, following:

January 25, 1888	$142 39
January 31, 1888	142 25
February 13, 1888	43 80
February 24, 1888	41 00

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March 26, 1888	$105 25	
April 2, 1888	9 00	
April 11, 1888	130 25	
April 18, 1888	3 50	
April 27, 1888	128 00	
		$745 44

CREDITS.

April 24, 1888, by goods returned	$10 00	
May 19, 1888, by goods returned	34 50	
May 19, 1888, by goods returned	7 50	
June 6, 1888, by goods returned	2 25	
Aug. 22, 1888, by damages allowed	1 20	
		55 45
		$689 99

Defendant pleaded the general issue, and gave notice that he would insist on the trial:

1. That the goods referred to in plaintiffs' declaration were sold to defendant by plaintiffs for good, merchantable, durable goods; that plaintiffs guaranteed them to be such, and agreed that defendant might return the goods if not such.

2. That the said goods were not good, merchantable, and durable goods, and defendant offered to return the same, but that plaintiffs refused to receive them.

3. That plaintiffs knew that said goods were of a poor quality; and that the sales made by defendant of said goods injured defendant's business, and that by reason thereof good and worthy customers have been turned away, and he has lost a large portion of his business, and defendant has been deprived of great gains and profits, and damaged to the extent of $1,000, which the defendant will recoup.

The case was tried before the court, and findings of fact and law were demanded and are presented.

On January 1, 1888, plaintiffs succeeded the firm of Fuller, Childs & Co., and defendant had actual notice of the change in the firm. Defendant had bought goods from Fuller, Childs & Co. during the year 1887, and on January 1, 1888, there was a balance due the old firm,

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which was subsequently paid by remittances to Childs, Lee & Dunlap on account of that indebtedness. The goods were sold on four months' time, at the end of which plaintiffs began to press collection; and on June 27, 1888, defendant wrote to plaintiffs, threatening to return all of their goods which he had then on hand; and in another letter, dated June 30, he informs them that the goods are packed, and are subject to plaintiffs' order. The goods packed, at the prices charged by plaintiffs, amounted to $483.45. It is admitted that the goods so packed embraced all of the goods then on hand purchased from plaintiffs, and that they included goods purchased prior to January 1, 1888, from the old firm of Fuller, Childs & Co. The court finds, first,—

"That in the latter part of the spring of 1887 said defendant engaged in the business of retail dealer in boots and shoes, and has since then continued in such business; and that soon after commencing such business the firm of Fuller, Childs & Co., of which said plaintiffs are the successors, through their agent, Mr. Cadwell, solicited said defendant to make purchase of goods in his line from said firm of Fuller, Childs & Co., and, to induce defendant to trade with said firm, told said defendant that all goods purchased of said firm by him should be of a good and merchantable kind, character, and material, and as good as the like priced goods of any other boot and shoe house in the United States, and that if such goods proved unsatisfactory to defendant he might return the same to said firm, and that said firm would warrant every pair of shoes to be of a good, merchantable, and workman-like character, and would stand by every pair, and make said defendant recompense for all loss which he might sustain by reason of handling said goods, if the same, or any part thereof, did not prove to be of the character so warranted; and that said defendant in the month of August, 1887, agreed to purchase goods of said firm of Fuller, Childs & Co. upon said warranty, and thereupon began to trade with said firm in accordance with said arrangement."

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This finding is not sustained by the proofs. The defendant gives the language used by the agent, Cadwell, as follows:

"He said: 'I will recommend them with any goods you can get anywhere; as good as you are buying from any other place. If they don't prove satisfactory, you can send them every pair back; even after a person wears them, you can send them back, and get another pair in their place. If the goods don't give satisfaction, send them all back.' Well, I told him: 'I can't lose nothing anyhow. If the goods don't prove good, then I will send them back. I will take a small order, and try them.' So I ordered some of them."

The first order was given in June, 1887, and other orders were given during that year, and a balance remaining due upon these orders was paid some time after January 1, 1888. Between January 1, 1888, and April 27, 1888, nine other separate and distinct orders for goods were given. No goods were returned during the year 1888, until April 24, when goods of the value of $10 were credited to defendant. Of the shipment made April 11, 1888, goods of the value of $34.50 were immediately returned as not suitable for that trade. The other goods returned during the year amounted in all to $9.75, and $1.20 was allowed for damages to one pair of shoes, which had been worn and returned. It will be noted that the trial order was given in June, 1887, and was followed by a number of other orders extending over a period of nine months, and that goods had been returned and credited without question. Indeed, defendant says: "I gave him [Cadwell] orders afterwards for different shoes, as long as he kept changing them." It does not appear that any question arose until some time in June, 1888, when the defendant packed up all of the goods purchased from plaintiffs, including some purchased in 1887, and notified plaintiffs that they were on hand subject to their order.

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Defendant undoubtedly had the right, under the contract of sale, to return the goods received by him upon the first order, if they did not prove satisfactory, and the plaintiffs had a right to rely upon the failure to return them as an acceptance of the goods. Defendant, having the option to return the goods, was bound to exercise that option within a reasonable time. Had defendant given but the first order, and retained the goods received for months, it will not be contended that he could then return the goods. Not only does he not return the goods, but he gives a number of subsequent orders, and pays for all the goods purchased within the first six months, and after a year elapses he undertakes to return goods, all of which had been held for two months, a portion for three months, a portion for four months, other portions for five months, and others from nine to twelve months. There is a wide difference between an option given to the buyer to return the goods if not satisfactory and a warranty of quality. The latter is continuous, and runs with the goods; but the former must be exercised within a reasonable time after the receipt of the goods, and the retention of the goods after the lapse of that reasonable time must be regarded as an acceptance, unless the option is extended in clear and unmistakable language.

The language used cannot be construed as a warranty. The sale of the first order was one on approval simply, with the privilege of a trial of the goods. As a matter of law, this option, even, did not extend to subsequent orders and invoices of goods, unless repeated with each order, or unless some general language was used covering all orders or sales. The defendant gave the first order for the very purpose of a trial of the goods. Having received the goods ordered, and other invoices of goods, before any of the goods sued for were ordered, he must

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be deemed to have had a sufficient opportunity for trial, and the plaintiffs were justified in assuming that the goods had proven satisfactory. *Waite v. Borne* (N. Y.), 25 N. E. Rep. 1053. It is unnecessary to notice other assignments of error.

This finding was erroneous, and a new trial must be had, with costs of this Court to plaintiffs.

The other Justices concurred.

LEWIS HURST, ADMINISTRATOR, ETC., v. THE DETROIT CITY RAILWAY.

Death by wrongful act—Pleading—Damages—Pecuniary injury.

1. How. Stat. § 8314, which permits the personal representatives of a deceased person whose death was caused by the wrongful act, neglect, or default of another to bring an action for the damages thereby sustained, clearly contemplates that *pecuniary* injury must result from such act, neglect, or default, which must be alleged in the declaration and shown by the evidence.
2. In a suit by the administrator of the estate of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. § 8314, for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded, and established by the evidence.
3. The right of action given by How. Stat. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1885 (8 How. Stat. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the first statute cited, by way of amendment to the declaration.

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Error to Wayne. (Brevoort, J.) Argued January 22, 1891. Decided February 6, 1891.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

D. A. Straker (John Miner, of counsel), for appellant, contended:

1. The record in this case raises no question of pleading; citing *Rowland v. Superintendents of the Poor*, 49 Mich. 555; *Sutton v. Van Akin*, 51 Id. 465.
2. It is at least *prima facie* evidence of gross negligence in a street-car driver to keep his face turned from in front of the horses while driving at a rapid rate of speed through a populous neighborhood, in which many children reside; citing *Stone v. Railroad Co.*, 115 N. Y. 104; *Hartfield v. Roper*, 21 Wend. 618; *Bouwmeester v. Railroad Co.*, 63 Mich. 557; and where there is any evidence of negligence, the question becomes one for the jury; citing *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Sheldon v. Railroad Co.*, 59 Id. 172.
3. To hold that, in the absence of evidence of specific pecuniary injury to the next of kin, no recovery can be had, is to declare that by the law of Michigan an action will be entertained, but no recovery allowed, for the death, caused by negligence to a degree amounting in law to a felony, of the infant child of poor parents. How. Stat. §§ 8313, 8314, which give the right of action, do not so read, and the law has not been so declared; citing *Ihl v. Railroad Co.*, 47 N. Y. 320; *Oldfield v. Railroad Co.*, 14 Id. 310; *O'Mara v. Railroad Co.*, 38 Id. 450.

Brennan & Donnelly and *Sidney T. Miller,* for defendant, contended for the doctrine stated in the opinion.

LONG, J. This cause was tried before a jury in the Wayne circuit court, where the defendant had verdict in its favor under direction of the court. Judgment being entered upon the verdict, plaintiff brings the case to this Court by writ of error.

The declaration alleges, substantially, that the defendant is a corporation organized and existing under the

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laws of this State; that on the ——— day of August, 1889, it was engaged in the carrying of passengers, for hire, in cars drawn by horses, through and along Brush street, in the city of Detroit; that Brush street was and is densely populated, whereby it became the duty of the defendant, by its servants and employés, to use due care and precaution in managing and driving said cars and horses attached thereto, and in such manner as not to endanger the safety of persons crossing Brush street, within the space mentioned in the declaration; but that the defendant, disregarding its duty in that behalf, on the ——— day of August, 1889, a certain car, to wit, car No. 100, then and there in the charge and custody of the servants and employés of said defendant, and then and there engaged in the service and business of said defendant, did so recklessly, negligently, and unlawfully operate, while passing the space aforesaid on Brush street, that plaintiff's intestate, the said Lorenzo Hurst, who was then and there an infant of the age of 1 year and 11 months, and who was then and there in the exercise of such due and reasonable care as was compatible with his age, in the act of crossing said roadway of said Brush street, by the said car and horses attached thereto was knocked down, trampled upon, and by the wheels and other portions of said car crushed and mortally injured, from which said injuries, as aforesaid negligently, recklessly, and unlawfully by the said servants and employés of said defendant inflicted upon said Lorenzo Hurst, he, the said Lorenzo Hurst, did die; by reason of which negligence of said defendant and injury to and death of said Lorenzo Hurst an action hath accrued to the said plaintiff as the representative of the next of kin of said Lorenzo Hurst, and in which he claims damages from the said defendant in the sum of $10,000.

After the trial of the cause had commenced, the plaint-

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iff asked leave of, and was permitted by, the court to amend his declaration by inserting the following:

"From which said injuries, as aforesaid negligently, recklessly, and unlawfully by the said servants and employés of the said defendant inflicted upon the said Lorenzo Hurst, he, the said Lorenzo Hurst, did languish in great pain and agony and suffering for the space of two hours thereafter, and, so languishing, did live, until afterwards, to wit, on the day and year aforesaid, he, the said Lorenzo Hurst, by reason of the said injuries so as aforesaid by the negligence of the said defendant received, did die."

Counsel for the plaintiff, in asking leave to file the amendment to the declaration, stated that the only cause of action sued for was the negligent killing of intestate, and he did not intend by the proposed amendment to change the cause of action from the one set up in the declaration, and in opening the case to the jury stated that he sought to recover in the suit under How. Stat. § 8314.

The plaintiff gave evidence on the trial tending to show that—

"About mid-day of the 21st of August, 1889, plaintiff's intestate, a male child of 23 months of age, and just beginning to walk, was engaged with 15 or 20 other children in some childish amusement upon Brush street, in Detroit. The neighborhood is a populous one, in which many children reside. The width of the street between curbs at this point is 28 feet. Through the center of this space runs the track of the defendant corporation, upon which it operates a line of cars, drawn by horses, for the carriage of passengers for hire. One of the cars of defendant came along at a rapid speed. The car thus progressed a distance of 125 feet before reaching the intestate, while the driver kept his face turned aside from in front of the car. Plaintiff's intestate was knocked down and driven over while he was in the act of crossing the track. Both the front and rear wheels passed over his body, crushing and wounding him so that he died in less than an hour afterwards. The driver did

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not attempt to check the speed of the car until after the injury had occurred. The father and mother of the intestate are both living. The father is 54 years of age; an invalid, poor, and unable to render any assistance in supporting the family. The mother worked at washing and ironing, at which she supported herself and family, including the husband (plaintiff in error). The family consisted of the parents and 7 children, the oldest of whom was 16 years, and the youngest 23 months (the intestate). The mother, on the day in question, had gone from home at half past 6 o'clock in the morning, to work, leaving the infant intestate under the care of a child 10 years of age. The father (the plaintiff) at this time had been away from home, and at the Soldiers' Home, Grand Rapids, for about 10 days. No evidence of specific pecuniary damages was given."

No testimony was offered on the part of the defendant, and the parties rested their case. Defendant's counsel thereupon requested the court to charge the jury that, under the pleadings and proofs, the plaintiff could not recover. After the argument upon such request to charge, the plaintiff asked to be permitted to amend his declaration so as to include a claim for damages under the provisions of Act No. 113, Laws of 1885. The court refused to allow this amendment, and directed verdict for defendant.

Two questions only are raised:

1. That the court erred in refusing to allow the amendment.
2. That the court erred in directing the verdict, as requested by defendant's counsel.

The court very properly refused the plaintiff's amendment to his declaration. The act referred to, which is an amendment to How. Stat. § 7397, provides that—

"In addition to the actions which survive by the common law, the following shall also survive, that is to say: Actions of replevin and trover; actions of assault and battery, false imprisonment, for goods taken and carried

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away, *for negligent injuries to the person*, and actions for damage done to real or personal estate."

By the amendment the plaintiff sought to introduce into the cause a right of recovery for the injuries inflicted upon plaintiff's intestate, and for the recovery of which the plaintiff's intestate might have had an action if living, and which action, it was claimed, survived to the plaintiff by virtue of this statute. This amendment would have introduced into the case a new and different cause of action than that stated in the declaration. Under the declaration as framed, if any damages were recoverable at all, it was only such damages as resulted from the loss of service by reason of the death of the child; while the claim of recovery under the proposed amendment was for the injuries inflicted and suffered up to the time of its death,—that is, such damages as the child might have recovered for the injuries if living, and which it was claimed survived, by this statute, to the father and mother. Satisfaction of the claim made by the declaration would be no bar to the other if such an action could be maintained. The claim made is one given by statute, and which did not exist at the common law; the proposed amendment is for the recovery for injuries, and the right to which is given by the common law, and which died with the party, unless made to survive by this statute of 1885; thus showing two separate and distinct causes of action. The proof of one would not sustain the other, and the right to damages, and the measure thereof, depended upon a different class and kind of proof,—one measured by the pecuniary value of the service of the child, less the cost of maintenance; and the other, the actual damage sustained by the child by reason of the injury, such as the inability to perform his usual labor, physical pain and suffering, depending upon the degree of the injury and pain and suffering endured.

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The court was not in error in directing the verdict in favor of the defendant. The action was brought under How. Stat. § 8314, which provides that—

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered."

No proof was made by the plaintiff of any pecuniary loss, and there is no such allegation in the declaration. It is argued, however, by the counsel that this statute declares the liability of the person or corporation whose negligence caused the death, and that, therefore, no evidence of pecuniary damages was requisite to entitle the next of kin to maintain the action and to recover such damages; that the statute itself refers it to the jury, to give such damages as they shall deem fair and just.

The action is by the administrator of the intestate's estate, and, if any recovery is had, it is, under the statute, for the benefit of the parents, the father and mother, who are both living. It is for the pecuniary loss sustained by them; and the measure of such damages, if any are recoverable in such cases, is limited to the prospective earnings of the child until his arrival at the age of 21 years, taken in connection with his prospect of life, less the expenses of his care and support. *Rajnowski v. Railroad Co.*, 74 Mich. 20; 2 Thomp. Neg. 1292. There would also be a limit upon this, dependent upon the probable duration of the lives of the parents, as no estimate of such prospective earnings could extend beyond

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the expectancy of the lives of the parents and the survivor of them. *Clinton v. Laning*, 61 Mich. 361. It is well stated by counsel for the defendant that it has the same element and the same measure of damage which the parent sustains and can recover in case of permanent injury resulting in partial or total disability of the child to render services to the parent; that it is also equivalent to the element of actual damages recoverable by an injured party who is disabled, and thus rendered unable to perform his usual work, or apply himself to his trade, and thereby he loses his prospective earnings; and that this may be termed the pecuniary damage or loss sustained by the injured party. The question is therefore presented whether damages of this character are special in their nature, and not such as necessarily flow from the injury, or, as in this case, necessarily follow from the fact that death results from the injury.

It is contended on the part of the plaintiff that the statute does not contemplate that such damages are special, but refers every such action to the jury, to estimate and give such damages as they shall deem fair and just. The statute provides that when a person is killed by negligence, and pecuniary injury results, the right of action for such injury survives to the personal representatives. It clearly contemplates that pecuniary injury must result from the negligent act; and therefore, to entitle a party to recover in such action, the negligence must not only be established, but also some pecuniary injury or loss must be shown by evidence. Such damages for the loss of prospective earnings are special in their character, and must be specially pleaded, and a recovery can only be had based upon evidence establishing the fact. *Pennsylvania Co. v. Lilly*, 73 Ind. 254; *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453, 459; *Baldwin v. Railroad*

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Corp., 4 Gray, 333; *Tomlinson v. Derby*, 43 Conn. 562; *Taylor v. Monroe*, Id. 42; *Dunn v. Railway Co.*, 21 Mo. App. 205; *Matthews v. Railway Co.*, 26 Id. 84; *Perry v. Banking Co.*, 85 Ga. 193 (11 S. E. Rep. 605); *Railroad Co. v. Orr* (Ala.), 8 South. Rep. 363. There is no allegation of special damages in the declaration, and it does not count upon the pecuniary loss of the prospective earnings of the intestate; the theory of the plaintiff being that no such allegation was necessary, and no proofs required, but that the action was brought for the negligent killing, and nothing else. It is necessary to a recovery in such cases that the pecuniary loss be alleged in the declaration, and that some proof be introduced to establish the facts so alleged.

It was said by Mr. Justice CHAMPLIN in *Cooper v. Railway Co.*, 66 Mich. at page 271:

"The statute authorizes the jury, in every case of this kind, to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute the jury are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted."

Attention is directed to the reasons given in that case why such testimony is necessary in support of such claim of damages. In *Rajnowski v. Railroad Co.*, 74 Mich. 27, this class of testimony was offered, and rejected by the trial court, and we there held this testimony admissible. In *Van Brunt v. Railroad Co.*, 78 Mich. 530, the action was brought under sections 3391 and 3392, How. Stat., which provide that in an action by an administrator against a railroad company for the alleged negligent killing of his intestate the jury shall give such damages as are fair and just, which shall be distributed to the persons entitled thereto under the statute of distributions. It was held that the administrator must show that some

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person has suffered some pecuniary injury by the death.

But it is contended by the learned counsel for the plaintiff that the plaintiff was entitled to recover at least nominal damages. As before stated, however, the statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing. It is a matter to be made to appear by proper allegation in the declaration, and proof of the fact. Nominal damages cannot be recovered, unless supported by evidence. *Franklin v. Railway Co.*, 3 Hurl. & N. 213; *Duckworth v. Johnson*, 4 Id. 653.

Counsel for defendant contend that the administrator must show that the injurious act of which he complains was caused by the negligence of the defendant, and that he is not relieved from the charge of contributory negligence on the part of the deceased, or on the part of those having the care of the deceased; that it is a case where the parents seek to benefit themselves; and, if their negligence in any way contributed to the accident from which they seek a benefit, they should be barred from any recovery. 1 Shear. & R. Neg. § 71, and cases there cited; *Glassey v. Railway Co.*, 57 Penn. St. 172; *Railway Co. v. Snyder*, 24 Ohio St. 670; *Wright v. Railroad Co.*, 4 Allen, 289; *Weil v. Railroad Co.*, 5 N. Y. Supp. 833, —are all cited in support of this proposition. I should be of this opinion if the question were one necessary to the disposition of the case, but, from the view we take, the court was justified in directing a verdict upon the other branch of the case. No special damages were alleged or proved, and for this reason the court very properly directed the verdict in favor of the defendant.

The judgment must be affirmed, with costs.

The other Justices concurred.

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The City Bank of Dowagiac v. Caiphas Dill.

Bills and notes—Good-faith holder—Collateral security—Evidence—Deposition.

1. A banking firm received from a customer the promissory note of a third person, not yet due, as collateral security for a loan made to the customer, which was not evidenced by any writing. Nine days afterwards, and after the note was due, the customer gave the bankers his note for the amount of the loan, drawing interest at ten per cent., and the bankers continued to hold the first note as collateral to the second note, but without the consent of the maker, which latter holding is held to be subject to any defenses which existed between the maker of the note and the customer.
2. A stipulation for taking the deposition of a witness in another state provided that it should be taken on the direct and cross interrogatories annexed to the stipulation before a designated county judge, on the corporal oath of the witness, to be first administered by the commissioner. The deposition was to be annexed to the interrogatories and stipulation, and returned by mail to the clerk of the court where the suit was pending. The papers were received by the clerk inclosed in a sealed envelope, but not so attached together. The affidavit of the witness was attached, in which he swore that his answers to the interrogatories propounded to him by the county judge were true and correct; and the judge certified that the witness was duly sworn before the questions were asked, and was sworn to the answers after they were given. And it is held that, the deposition having been taken under stipulation, the Court are not inclined to reject it because of the failure of the commissioner to attach the papers together; and that the return shows that the witness was sworn both before and after giving his testimony.

Error to Cass. (O'Hara, J.) Argued January 23, 1891. Decided February 6, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

F. J. Atwell, for appellant.

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Coy W. Hendryx, for plaintiff.

CHAMPLIN, C. J. Suit was commenced in justice's court by the City Bank of Dowagiac against Caiphas Dill to recover the amount claimed to be due upon a due-bill signed by Dill, payable to G. S. O'Brien or bearer, one day after date, for $80. It was dated November 10, 1886. The parties appeared before the justice, when the plaintiff declared verbally upon all the common counts in *assumpsit*, and specially upon the due-bill, which reads as follows:

"DOWAGIAC, November 10, 1886.

"Due one day after date, G. S. O' Brien or bearer, eighty dollars ($80.00), for value received, with interest.

"C. DILL."

The plaintiff filed the due-bill as a full bill of particulars. The defendant pleaded—

"The general issue; want of consideration; no consideration for the note; note came into plaintiff's hands after it was due."

After the testimony before the justice was taken, plaintiff, by leave, amended its pleadings "so as to show that its interest in the note sued on extended only so far as the principal indebtedness of G. S. O'Brien's note to the plaintiff, collateral to which note is the note in issue of Caiphas Dill;" and thereupon the note of G. S. O'Brien was offered in evidence by the plaintiff, and reads as follows:

"DOWAGIAC, MICH., Nov. 19, 1886.

"On demand, after date, I promise to pay to the order of D. Lyle & Co. fifty dollars at the Dowagiac City Bank, Dowagiac, Michigan, with interest at ten per cent. per annum. Value received.

"G. S. O'BRIEN."

The following indorsement appears on said note:

"DOWAGIAC, April 1, '87.

"Pay to the order of City Bank.

"D. LYLE & CO."

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On the trial in the circuit the plaintiff introduced testimony tending to prove that about April 1, 1887, the notes were assigned to plaintiff by the firm of D. Lyle & Co.;[1] that the note of Dill for $80 was pinned to the note of O'Brien for $50 as collateral security therefor; that D. Lyle & Co. loaned to O'Brien, on November 10, 1886, $50, which transaction was not evidenced by a note, or in any other manner than by a slip made by them, and which was regarded by them as a cash item; that at the same time they received from O'Brien the due-bill (written in pencil) for $80 as a collateral security for such loan of $50; that afterwards, and on November 19, 1886, they received from O'Brien his note for the $50 loaned to him on the 10th, and that they continued to hold the note for $80 as collateral security for this note. There was no assignment of the indebtedness of $50, which existed in the form of a cash item from the 10th to the 19th of November, from D. Lyle & Co. to the City Bank. It does not appear that Dill knew of or consented to the change in form of the indebtedness from a cash item to the note, or that he consented in any manner that his note might be held by D. Lyle & Co. as collateral security for such note.

Defendant claimed, and gave testimony of himself, corroborated by the testimony of two witnesses, that he, being indebted to one Gage in the sum of $80, was requested by O'Brien to permit him to pay Gage, as he thought he could induce Gage to take a wagon and some groceries, and Dill pay him (O'Brien) the money due Gage, as he could make better use of the money than he could of the property, to which Dill assented; that O'Brien then drew up the due-bill for $80, and Dill

[1] Plaintiff was the successor of D. Lyle & Co., a firm of private bankers, and the assignment of the O'Brien note was made to the bank in the firm name, after the death of Mr. Lyle, by one of the surviving partners.

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signed it, O'Brien agreeing that, if he did not succeed in paying Gage in the manner proposed, he would return the due-bill to Dill; that this was on November 10; that afterwards the due-bill was still in O'Brien's possession; that on November 24, 1886, Gage, O'Brien, Dill, and Srackangast were in O'Brien's store, and Gage requested Dill to pay him the $80 which he owed him; that Dill asked O'Brien if he had paid Gage, and he replied that he had not, and said, "You pay Gage;" that Dill thereupon paid Gage, and demanded the due-bill from O'Brien, who replied he had put it in the bank three or four days before, but that Dill need not be troubled about it, as he would take care of it; that Dill told him he had no right to put it in the bank, and he said to Dill not to be troubled, as he would get it,—take care of it.

The court presented the case to the jury upon the question whether the firm of D. Lyle & Co. received the due-bill as collateral security before it was due, and told them that the introduction of the note in evidence made a *prima facie* case; and that—

"When Mr. Dill questions the good faith of the assignment of this note before maturity in order to defeat a recovery, he must, before he can recover, satisfy you by a fair preponderance of evidence that the assignment to Lyle & Co. was made after maturity, or that the note was not made for value, or that Lyle & Co. took the note with notice of the defense interposed by Mr. Dill."

Under the testimony disclosed by this record, this charge as to the burden of proof is erroneous. The testimony of defendant, if believed, made a complete defense to the note, and threw the burden of proof upon the plaintiff to show that D. Lyle & Co. purchased it before maturity, for value, and without notice of facts which constituted a defense as against the note in O'Brien's hands. *Manistee National Bank v. Seymour*, 64 Mich. 59. This testimony should have been submitted to

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the jury under proper instructions as to the law, in case they found it true.

If the jury should find the facts as the defendant's testimony tended to prove them to be, then the plaintiff could not recover in this case, for the reason that, although the note, if received by D. Lyle & Co. before maturity to secure the payment of cash loaned to O'Brien, might be held by them for a repayment of such cash, yet, after the maturity of the note, their protection as innocent purchasers did not extend to holding it as a collateral security for a new and different engagement of O'Brien, as evidenced by the note of November 19. Here was a new and additional agreement to pay interest at the rate of 10 per cent. To all intents and purposes it was a new and original agreement, and a new pledge of the note for $80 after its maturity, and therefore open to any defenses which existed between O'Brien and Dill. It is this note which forms the basis of any recovery by the plaintiff as assignee from D. Lyle & Co., and not the original indebtedness or consideration passing between O'Brien and D. Lyle & Co., for which the $80 note was pledged as collateral. Had the note of November 19 not contained any new agreement, but merely evidenced the original transaction, the case might be different if the pleadings had been such as to permit proof to be made of the original agreement.

We see no objections to the deposition, except that the papers were not attached together; but, as it is conceded that they were received by the clerk inclosed in a sealed envelope, and having been taken under stipulation, we are not inclined to reject them on that ground. The return shows that the witness was sworn both before and after giving his testimony.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

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JOHN BUEHLER v. LOUIS DELEMOS, DEMAS ST. LOUIS, AND JOHN H. LEY.

Writ of error—Appeal-bond—Judgment against surety—Attachment—Affidavit—Service—Joint debtors.

1. Under a writ of error bringing up the judgment record in a suit appealed from justice's court, in which judgment was rendered at the circuit against the surety in the appeal-bond under the statute, errors assigned upon the refusal of the circuit court to vacate the judgment as to the surety upon his petition and accompanying affidavits cannot be considered.
2. A return by an officer to a writ of attachment, issued against two joint debtors, that he had attached the goods of one of them, upon whom he had made personal service, and that after diligent attempts he was unable to find the other defendant in his county, and had left a certified copy of the attachment and inventory with the defendant in whose possession he found the attached goods, the other defendant having no last place of residence in the county, is in accordance with How. Stat. § 6841, and authorizes the justice to proceed under How. Stat. § 6845[1].
3. An averment in an affidavit for attachment that there is a debt due to the plaintiff from the defendants upon express and implied contract is equivalent to averring that the debt is due upon express and upon implied contract, and is sufficient.

Error to Wayne. (Brevoort, J.) Argued January 9, 1891. Decided February 6, 1891.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

John W. A. S. Cullen, for appellants, contended:

1. Defendant Ley was entitled to have an issue of fact framed, under which he might be able to maintain by due proof the

[1]See *Langtry v. Wayne Circuit Judges,* 68 Mich. 451, holding that personal service of a justice's writ of attachment, unless made after levy and accompanied by the statutory inventory, is insufficient to give jurisdiction over the defendant.

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terms on which he signed the appeal-bond, as set forth in the first assignment of error (*a*)[1], and he cannot be deprived of his rights in the premises by the mere *ex parte* entry of a judgment under How. Stat. § 7029; citing *Evers v. Sager*, 28 Mich. 47; *Hessell v. Johnson*, 63 Id. 623.

2. Counsel cited, in support of the second assignment of error (*b*), *Woodin v. Durfee*, 46 Mich. 424, 426; *Gunn v. Geary*, 44 Id. 615; *Hessell v. Johnson*, 63 Id. 623.

3. In support of the objection that the affidavit is defective in averring that the indebtedness was due upon express and implied contract, counsel cited *People v. Blanchard*, 61 Mich. 478, 480, and cases cited.

Dickinson, Thurber & Stevenson, for plaintiff, contended for the doctrine stated in the opinion.

CHAMPLIN, C. J. This suit was commenced by attachment before a justice of the peace for the county of Wayne, and resulted in a judgment for the plaintiff. Defendant St. Louis appealed to the circuit court. The bond on appeal recited that "we, Demas St. Louis, as principal, and John H. Ley and Fred Holcomb, as sureties, * * * are held," etc., and was in the ordinary form, containing the condition required by statute, and was signed by Demas St. Louis and John H. Ley, but not by Fred Holcomb. John H. Ley appeared before the justice, and justified as to his responsibility under oath by affidavit subscribed by him and sworn to before the justice, and the justice certified as follows: "I hereby certify that the sureties in the foregoing bond justified their pecuniary responsibility as such on oath,"—which certificate was dated, and signed by the justice. The date of the certificate is the same as that of the bond and of the justification of Ley.

In the circuit court the plaintiff again had judgment, which under the statute was rendered against the defend-

[1]See *Stringer v. Dean*, 61 Mich. 196, 202, for a case on this subject.

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ants, DeLemos and St. Louis, and the surety in the appeal-bond. The judgment was entered on June 12, 1888. Ley then filed a petition in the circuit court for the county of Wayne, supported by his own affidavit, and those of his attorney, John W. A. S. Cullen, and Demas St. Louis, setting up that the judgment in the circuit court was rendered against him without notice, and that the first knowledge he had of it was in the latter part of February or the first part of March, 1890; that he signed the appeal-bond under the express agreement with Demas St. Louis that Fred Holcomb should also sign such bond as surety, and that he would not have signed it otherwise; and that he saw Holcomb's name as surety in said bond when he signed and justified, and supposed that the bond would not be used or delivered until Holcomb had also signed, so as to be jointly liable with him, and supposed and believed that Holcomb had signed the bond until the time last above mentioned; that a gross injustice has been done him by using said bond as an appeal-bond, with his name as the only surety thereon,—and asking the circuit court to vacate said judgment as against him, leaving the plaintiff to his remedy by suit at law upon the bond. The application was denied by the circuit court, and the case is brought here by writ of error.[1]

The only errors which can be considered upon the

[1] The record consisted of the proceedings had in justice's court and in the circuit court, including the petition to vacate the judgment in the latter court as to the surety, and the affidavits in its support, and the order of denial, there being no bill of exceptions in the case. The errors assigned, aside from those specifically referred to in the opinion, were, in substance, that the court erred in rendering judgment against the surety, because—

a—He never became liable on the appeal-bond, having signed it on the express condition and understanding that the co-surety therein named should also sign the bond, which was only to become operative when such signature was affixed.

b—The bond shows that it was never perfected by such signature, and withal was a bond referring to a judgment in favor of the plaintiff, and against Demas St. Louis *alone*, and did not refer to a judgment against *both* of the defendants.

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record, if any, are those which go to the jurisdiction of the justice over the persons of the defendants. The particular grievances mentioned in this petition of Ley cannot be raised upon writ of error.

It is claimed by plaintiffs in error that the justice's court did not acquire jurisdiction over the person of Louis DeLemos on account of insufficient service of the attachment. The record shows that personal service was made upon Demas St. Louis, and that the officer attached the goods of Demas St. Louis, and that after diligent attempts to find the defendant Louis DeLemos he could not find him in Wayne county, and left a copy of the attachment and inventory, duly certified by him, with Demas St. Louis, in whose possession he found the goods attached, the said Louis DeLemos having no last place of residence within the county. The return of service appears to have been in accordance with How. Stat. § 6841, and the court, in case of two joint debtors, is authorized to proceed, if personal service is had upon one, by section 6845.

The further objection, that the affidavit was void in stating that there was a debt justly due the plaintiff from Louis DeLemos and Demas St. Louis upon express and implied contract, is not good. If it were in the disjunctive it would be bad; but it is equivalent to saying that the debt is due upon express contract and upon implied contract, which would be the sense if a comma were inserted after the word "express;" and if it would be good with a comma inserted, it is good without.

We think the judgment of the circuit court should be affirmed, without prejudice to any remedy the surety may have for relief in a proceeding, where his claim for relief may be brought before a proper forum. Judgment affirmed.

The other Justices concurred.

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BERT WELLMAN v. THE BOARD OF METROPOLITAN POLICE OF THE CITY OF DETROIT.

Public officers—Dismissal—Specification of charges—Board of police.

The board of police commissioners of Detroit cannot find a member of the force guilty of conduct immoral and unbecoming an officer without any specification of the charge.

So *held*, where such general charge was followed by a specification charging the officer with a felony, of which he was not found guilty under the testimony, but the commissioners made a finding that he was guilty as charged of conduct immoral and unbecoming an officer, and was not entitled to the office of a patrolman, and should be dismissed from the force; which finding and sentence are set aside, and the patrolman ordered reinstated.

Mandamus. Submitted January 20, 1891. Granted February 11, 1891.

Relator applied for *mandamus* to compel respondent to revoke an order dismissing him from the police force, and to reinstate him as such member. The facts are stated in the opinion.

John Miner, for relator.

Charles M. Swift, for respondent.

PER CURIAM. Relator was appointed a patrolman of Metropolitan Police of Detroit on June 28, 1887, and qualified and entered upon the discharge of his duties. On October 17, 1890, by direction of the superintendent, charges were preferred against relator in and by which he was charged in general language of "conduct immoral and unbecoming an officer." Under this charge was a specification charging relator with the commission of a

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heinous crime, punishable as a felony under the statutes of this State. The relator was duly summoned, and pleaded not guilty to the specification. A large amount of testimony was taken, after which a statement was filed in the case in the office of the board reviewing the testimony, and stating the conclusion reached by the board, in which it is said:

"Wellman may not be guilty in manner and form as stated in the specification. That he is guilty as charged of 'conduct immoral and unbecoming an officer' is the judgment of the board, and that he is not entitled to the office of patrolman, and should be dismissed from the force."

This conclusion was adopted as the finding of the board, and the same was recorded by the secretary in the records as follows:

"That he is guilty as charged of conduct immoral and unbecoming an officer is the judgment of the board, and that he is not entitled to the office of a patrolman, and should be dismissed from the force."

Upon a review of the testimony, which is annexed to and made a part of the return, we think the board did right in not finding relator guilty of the specification. The testimony to sustain the specification under the general charge was of the most untrustworthy and unreliable character, and entitled to no credit whatever, and Wellman should have been found not guilty without any hesitation on the part of the board; and when a person is found not guilty of the specification, or if he is not found guilty thereof, he cannot be found guilty of the general charge, for the reason that general charges must be followed by one or more specifications setting forth the offense charged, with particulars or specifications of time and place, with such certainty as will apprise the person charged of what he is called upon to meet. In the general charge of "conduct immoral and unbecoming an officer"

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there is no statement of what act he was accused of as being immoral or unbecoming an officer, nor when nor where he so conducted himself. It is not required, and it is not expected, that the accused will be called upon to meet such general charge, separate from the specification under it; and it would be manifestly wrong to find a member of the force guilty of such general charge, and expel him from the force.

The powers of the Metropolitan Police Board are derived from the statute establishing a police government for the city of Detroit. Section 10 of the police act provides for preferring charges before the board touching the character, competency, or affecting the acts, conduct, etc., of any officer or policeman. The board is required, after reasonable notice to the person charged, to proceed with his trial, and the board may make an order of removal, or suspension for some certain period.[1] Section 9 provides that no person, except superintendent, surgeon, attorney, detectives, secretary, and property clerk, shall be removed from the force except upon written charges preferred against him to the board of police, and after opportunity of being heard in his defense, but they may suspend any member of the force pending the hearing of charges against him.[2] See, also, section 5, to the same effect.

This is a case of discipline within the force, and we have no inclination, nor indeed authority, to interfere, except to secure to an accused person his legal rights under the laws of the land. Discretion of the board, exercised in a legal manner, is not open to review. But every accused member of the force has the right, secured to him by the law, to have the charges preferred against him reduced to writing, and sworn to (section 10), and

[1] 3 Laws of 1871, p. 236.
[2] Act No. 32, Laws of 1882.

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that they specify, with sufficient certainty of time and place to enable him to make his defense, the delinquencies set out in section 10 of the police act. This was not done in this case, and Wellman has not had an opportunity to be heard upon any charge touching his character or competency, or affecting his acts, conduct, or omission, as an officer or policeman, nor for a violation of or misconduct as defined or prescribed by the rules and regulations of the board, which specifies the act complained of, upon which he was found guilty.

The board of police commissioners do not act as a court, and the formal and technical rules of pleading and practice do not apply to their investigations. While it is important to good discipline that they may act summarily, giving notice and reasonable opportunity to the accused to make his defense, yet the foundation of their proceeding is that written charges shall be made. This implies that the charges shall specify, with reasonable certainty of time and place, the particular conduct or omission of duty complained of; and it is manifest that a member of the force cannot be tried for one offense, and be found guilty of a different offense from that specified. We approve of the principles enunciated in the cases cited by respondent, viz.: *People v. French*, 110 N. Y. 494 (18 N. E. Rep. 133); *People v. Commissioners*, 98 Id. 332; *Devault v. Camden*, 48 N. J. Law, 434 (5 Atl. Rep. 452); *People v. French*, 32 Hun, 112; *State v. Commissioners*, 16 Mo. App. 48; *Ayers v. Newark*, 49 N. J. Law, 173 (6 Atl. Rep. 660). An examination of these cases will show that, under the general charge, there were specifications filed upon which the accused was found guilty. We do not think the board could find Wellman guilty of conduct immoral and unbecoming an officer without any specifications of the charge.

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It follows that the findings and sentence of dismissal should be set aside, and Wellman reinstated as a patrolman of said force. Of course this will not prevent further proceedings under proper charges and specifications.

FRANK HESTER ET AL. v. F. H. CHAMBERS, ASSOCIATE JUDGE OF THE RECORDER'S COURT OF DETROIT.

Condemnation proceedings—Qualifications of juror—New trial.

1. Where a jury in condemnation proceedings disagree, and are discharged, the members of the panel are disqualified to sit as jurors in new proceedings to condemn the same land for the purposes mentioned in the first petition.
2. Where in such a case a juror, upon his examination as to his qualifications, denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the contesting party was ignorant of his having acted as a member of the former panel, and of the submission of the question of such necessity to him as a member thereof, until after the second proceedings were ended, he is entitled to have the verdict set aside and to a new trial.

Mandamus. Submitted January 21, 1891. Granted February 12, 1891.

Relators applied for *mandamus* to compel respondent to set aside a verdict in condemnation proceedings. The facts are stated in the opinion.

E. T. Wood, for relators.

John J. Speed, for respondent.

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PER CURIAM. The petition shows that several proceedings have been instituted on behalf of the Commissioners of Parks and Boulevards of Detroit to condemn lands for the opening and widening of that way. In the condemnation of lands in cities and villages for the use and benefit of the public, the necessity for using such property, and the just compensation to be made therefor, must be ascertained by a jury of freeholders. Const. Art. 15, § 15; Id. Art. 18, § 2.

The sole question presented by the petition in this case is whether a juror who has been summoned and acted upon the jury in a proceeding to condemn a parcel of land, but in which the jury disagreed and were discharged, is competent and qualified to sit and act upon a subsequent panel in proceedings to condemn the same parcel for the same purposes mentioned in the former petition. We think it clear that he is disqualified, and might have been challenged for cause; and when the juror, before being sworn, was examined as to his qualifications, and denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the party was not aware that he had sat upon a former panel, and had the question submitted to him as a member thereof, and the party did not discover the fact until after the second proceedings had closed, the party is entitled to have the verdict set aside and a new trial before a disinterested and impartial jury.

The *mandamus* must issue as prayed for in the petition.

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GEORGE T. SMITH v. GEORGE S. HOSMER, CIRCUIT JUDGE OF WAYNE COUNTY.

[See 80 Mich. 200.]

Assignment for benefit of creditors—Jurisdiction—Contempt—Mandamus.

A complainant is guilty of contempt in filing a bill in a circuit court other than that having jurisdiction of proceedings under an assignment for the benefit of creditors, to enjoin a sale of the assigned property on the ground of the invalidity of the assignment, which question will not be tried on an application for *mandamus* to vacate an order adjudging the complainant guilty of such contempt.

Mandamus. Submitted February 3, 1891. Denied February 13, 1891.

Relator applied for *mandamus* to compel respondent to vacate an order adjudging him guilty of contempt. The facts are stated in the opinion.

Tarsney & Weadock, for relator.

E. F. Conely, for respondent.

McGRATH, J. This is an application for a *mandamus* to compel the respondent to vacate an order adjudging the relator guilty of contempt.

It appears that in January, 1890, the George T. Smith Middlings Purifier Company, a corporation doing business at the city of Jackson, in the county of Jackson, made an assignment under the statute; and that afterwards a petition was filed by certain creditors, in the circuit court for the county of Jackson, praying that the assignees might be ordered to file a new inventory and

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appraisal. Pending consideration of this petition, the assignment, the petition, and all matters connected therewith, were removed to the circuit court for the county of Wayne. The validity of such removal was before this Court, and this Court held that the circuit court for the county of Wayne had jurisdiction, and should proceed to exercise it. *Kittridge v. Circuit Judge*, 80 Mich. 200. The circuit court for the county of Wayne has ever since continued to exercise jurisdiction in the matter of the assignment, and divers and sundry proceedings have been had in the matter in said court. The assignees originally named were removed by said court, and Rufus H. Emerson and Zenas C. Eldred have been appointed receivers in their stead. Relator on January 25, 1890, filed his bill of complaint in the circuit court for the county of Jackson against the then assignees, praying for their removal, and that a receiver be appointed. The cause so commenced was removed to the Wayne circuit court. The assignees were removed, however, upon application made by creditors.

The receivers on January 10, 1891, filed a petition in said Wayne circuit court, setting forth the execution of the assignment aforesaid, by relator, as president of the George T. Smith Middlings Purifier Company; that a sale of certain of the real estate of the assignor, situate at Jackson, was fixed for and was had January 2, 1891; that the relator, in order to prevent persons from bidding at said sale, and to embarrass said receivers in the performance of their duties, on December 31, 1890, filed his bill in the circuit court for the county of Jackson, in chancery, against said receivers, without leave of said Wayne circuit court, setting forth that the said assignment and the subsequent appointment of said receivers were void; that said receivers threatened to sell said property, and that such sale would constitute a cloud upon

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the title of said property; and praying that the receivers be perpetually enjoined from selling said property. The petition of the receivers further set forth that, upon the bill so filed as last aforesaid, subpœnas were issued, and on the same date were served upon said receivers; and they pray that relator may be enjoined from prosecuting said suit, and that he be punished for contempt for bringing said suit without leave of the Wayne circuit court. It further appears that, upon the filing of said petition, an order was made requiring the said George T. Smith to show cause why he should not be enjoined and punished; that an answer was filed by said George T. Smith, in which he set up that said assignment was a fraud upon him, but he did not deny, but substantially admitted, the allegations of said petition; that a hearing was had, whereupon said George T. Smith was adjudged guilty of contempt, ordered to pay a fine, and to discontinue said suit. It is this order which relator asks this Court to set aside, on the ground that the original assignment was void, as well as all proceedings under it.

In the case above cited, it was held that it was the intention of the Legislature to place assignments under the control of the court acquiring jurisdiction. Under the statute, a new and special jurisdiction is conferred upon the courts over the entire matter of such assignments, the exercise of which cannot be interfered with by process from other courts. It has been held that a court, in the exercise of the powers conferred by the statute, is in effect an insolvency court, and the same general principles applicable to such courts must be applied; that the assigning debtor, the assignee, and all other persons having an interest in or upon the estate, are subject alike to the judgment of that court. *Hanchett v. Waterbury*, 115 Ill. 220; *In re Mann*, 32 Minn. 60 (19 N. W. Rep. 347). Such courts have the powers of a court of

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equity. *In re Nicholas*, 15 Hun, 317. Under the statute (section 8749), the circuit court in chancery of the proper county has supervisory control over all matters arising out of or under the assignment. The court of the proper county is the court having jurisdiction of the matter of such assignment. The receiver stands in the place of the assignee. *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272.

The forum in which the relator must question the validity of the assignment, if at all, is the court having control and jurisdiction of said matter, and it would be contrary to every principle of law to permit him to attack it elsewhere; nor can the validity of the assignment be tried upon this application.

The *mandamus* must be denied, with costs.

The other Justices concurred.

AARON STRONG v. VICTORY M. SMITH ET AL.

Wills—Devise to class of persons—Death of devisees—Right of surviving issue.

Under a will devising real estate in equal shares to the brothers and sisters of the testator and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator who survive him will take the estate devised to their parents respectively, such a devise being governed by How. Stat. § 5812.[1]

Appeal from Wayne. (Hosmer, J.) Argued January 6, 1891. Decided February 27, 1891.

[1] See *Mann v. Hyde*, 71 Mich. 278.

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Bill for partition. Complainant appeals from decree dismissing bill. Reversed, and cause remanded for entry of decree in accordance with the opinion, in which the facts are stated.

Palmer & Palmer, for complainant.

Stewart & Galloway, for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

McGRATH, J. On March 5, 1859, Justus B. Smith executed his last will, giving all of his real estate to Huldah Smith, his wife, for her sole use and benefit during her natural life-time, and after here decease, in equal shares, to "my own brothers and sisters and to the brothers and sisters of my said wife." Justus B. Smith died February 1, 1884, and Huldah Smith died in January, 1890.

At the time of the making of said will there were living John Smith, Jacob Smith, James M. Smith, Victory M. Smith, and David K. Smith, brothers, and Lucy A. Bruce and Mary Bentley, sisters, of the testator, and George P. Coan, a brother, and Rebecca Smith, Roxana Perry, Maranda M. Brighton, and Edith A. Strong, sisters, of Huldah Smith, wife of the testator. After the making of said will, and before the death of the testator, Lucy A. Bruce and Mary Bentley, sisters, and Jacob Smith, a brother, of the testator, died, each leaving issue. The legal heirs of Lucy A. Bruce, Mary Bentley, and Jacob Smith conveyed their interests to the complainant, who files a bill asking for partition, claiming title to an undivided one-fourth share of the real estate of which Justus B. Smith died seised, remaining after the death of Huldah Smith, and the payment of

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debts. The answer concedes the facts set up, but denies any title in complainant, and asks for a construction of the will.

By stipulation it is agreed that—

"1. If the issue of Lucy A. Bruce, deceased, Mary Bentley, deceased, and Jacob Smith, deceased, living at the time of the death of Justus B. Smith, took the respective shares of the estate of said Justus B. Smith, deceased, by his said will, in the same manner as their respective parents would have taken had they survived their said testator, as set forth in complainant's bill, then the complainant is entitled to partition as the grantee of said issue.

"2. If the said issue of said deceased sisters and brother did not take the respective shares of the estate of said Justus B. Smith, deceased, by his will, in the same manner as their respective parents would have taken had they survived the said testator, then said bill of complaint should be dismissed."

The circuit judge dismissed the bill of complaint, finding as a matter of law that—

"The will must be construed as speaking from the death of the testator, and the gift or devise, * * * being to a class part of whom are relatives and part of whom are not, must be construed as intending the class as it existed at the said testator's death, and for that reason brothers and sisters who died prior to the decease of the testator were not devisees or legatees, and the children through whom said complainant claims had no interest in the said Justus B. Smith's estate, and their deeds to said complainant conveyed nothing."

We think the court erred in this conclusion. How. Stat. § 5812, reads as follows:

"When a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

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This section has come down to us from the revision of 1838. Hence it antedates the instrument in question over 20 years, and the will must be construed in its presence. Similar statutory provisions have been enacted in nearly every state in the Union, and in most of them the precise question here has been raised and passed upon. Woerner, in his recent work on the "American Law of Administration," after calling attention to these statutory provisions, says:

"The effect of these statutes is to vest in the lineal descendants of the deceased legatee or devisee the interest which the latter would have been entitled to if *in esse* when the will took effect. * * * But as, in all cases of testamentary disposition, the testator's intention controls mere rules of construction, so these statutes will not be allowed to divert the gift contrary to the ascertained intention of the testator. Hence, if it appear that the testator intended no legatee to take unless he survived him, the legacy to one dying before the testator must lapse, although the legatee leave issue living." 2 Woerner, Adm'n, 930.

In re Stockbridge's Petition, 145 Mass. 517 (14 N. E. Rep. 928), the testator disposed of a portion of the residue of his estate as follows:

"One of said five parts I direct my executors to divide equally among the children of Chester Stockbridge."

David, a son of Chester and a nephew of the testator, died before the testator, leaving issue. Held, that by virtue of the statute, which is the same as ours, the issue of David, who survived the testator, were entitled to take what David would have taken had he survived the testator. The court say:

"The circumstance that the gift to him was only as one of a class does not prevent the operation of this statute."

In *Moses v. Allen*, 81 Me. 268 (17 Atl. Rep. 66), the will contained this clause:

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"All the rest and residue of my estate, real, personal, and mixed, I give, devise, and bequeath unto my nephews and nieces, in equal portions."

The court say:

"The question is whether the surviving children of deceased nephews and nieces who died prior to the death of the testator take the respective shares of their deceased parents. We think they do. It was decided in *Nutter v. Vickery*, 64 Me. 490, that upon reason, principle, and authority the lineal descendants of a relative of the testator having a bequest in the will are entitled to the legacy given to their ancestor, though the original legatee was dead at the date of the will; that such may fairly be presumed to have been the intention of the testator; and that our statute, which has been in force for nearly a century, was intended to secure this result. The only difference between that case and this is that in that case the relatives were referred to by name, while in this they are described by their relationship to the testator. We think this can make no difference in the application of the rule."

In *Woolley v. Paxson*, 46 Ohio St. 307 (24 N. E. Rep. 599), one Paxson devised a portion of his estate to his son Isaac for life, remainder to the children of Isaac in fee-simple. Isaac died before the testator, leaving two daughters; Almira, intermarried with one Wooley, and Nancy, intermarried with one Caulfield. Almira and Nancy also died before the testator, each leaving issue surviving the testator. Held, that, under the provisions of the statute relating to a devise to a child or other relation of the testator, the surviving issue of each of Isaac's two daughters took the share of the devise to Isaac's children which the deceased mother would have taken had she survived the testator. The court say:

"The rule as to the lapsing of devises and legacies, that prevailed before the statute, defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time, and as though his will took effect at

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the date of its execution, not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments, and should receive a liberal construction, so as to advance the remedy and suppress the mischief."

After referring to the statutory provision, the court continues:

"Nothing is more just and conformable to the probable intention of the testator in every instance. The fact that the child or relative is not mentioned by name should not defeat the application of the statute where the language, applied to the facts as they were at the execution of the will, designates a child or relative as an object of the testator's bounty with as much certainty as if it were mentioned by name. * * * They were all adults, and their names well known to him, and the devise that he makes is to Isaac for life and then to *his children* in fee-simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee-simple in remainder as definitely as if it had been to each by name. * * * Hence, as under a devise to a class each member who survives the testator would, independent of the statute, take an aliquot part of the devise as a tenant in common with the other survivors, therefore, under the statute in such case, the issue of a deceased member of the class surviving the testator must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable."

See, also, *Moore v. Dimond*, 5 R. I. 121; *Guitar v. Gordon*, 17 Mo. 408; *Jamison v. Hay*, 46 Id. 546; *Cheney v. Selman*, 71 Ga. 384; *Yeates v. Gill*, 9 B. Mon. 203; *Hoke v. Hoke*, 12 W. Va. 327; *Jones v. Jones*, 37 Ala. 649; *Gordon v. Pendleton*, 84 N. C. 98; *Shepard v. Shepard*, 60 Vt. 109 (14 Atl. Rep. 536); *Chenault v. Chenault*, (Ky.), 9 S. W. Rep. 775, 11 Id. 426; *Dixon v. Cooper*, 88 Tenn. 177 (12 S. W. Rep. 445).

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In the present case, by the terms of the will itself, as well as by the operation of our statute relating to grants and devises made to two or more persons (How. Stat. § 5560), the devisees are made tenants in common. The testator distributed to each an equal share. The devisees, at the time of the execution of the will, were all known to the testator. They had matured. The "class" was liable to diminution only. The fact that the brothers and sisters of the testator were not named does not take them out of the statute. Indeed, under the authorities, the question—

"Whether a gift is one to a class does not depend upon the fact that the devisees are not named individually, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons, *uncertain in number at the time of the gift*, to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons."

Here the body of persons was not uncertain in number. The gift was to a certain number, in "equal shares."

It may be urged that it was not the intention of the testator to make any distinction between his own brothers and sisters and those of his wife, and that the interpretation insisted upon by complainant makes the heirs of his own brothers and sisters take, while the heirs of any one of his wife's brothers and sisters would not take; but the same would be true in case of bequests to A., B., and C., children, and D., a stranger, of definite amounts, for in case of the death of D. his issue would not take, while in the case of the death of A., B., and C. their issue would take under the statute, and solely by virtue of the statute.

It cannot be contended that the sole object of the statute is to provide for the disposition of property as to which the will fails, for it only relates to such lapses as

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would occur by the death of any child or other relation of the testator, and has no application, in any event, to the issue of persons other than children or relatives. The evident intent of the Legislature was not to prevent lapses in general, but to provide for the protection of the kindred of the testator. The case of *Eberts v. Eberts*, 42 Mich. 404, has no application, for in that case a different disposition was made by the will. The devise was "to the surviving children of my brothers," and the Court held that the testatrix intended those children of her brothers who survived the testatrix. It is clear that the statute was intended to control any and all legacies or devises to children or relatives, whether the children or relatives are the only legatees or devisees, or whether included with other classes not coming within its protection. Lucy A. Bruce, Mary Bentley, and Jacob Smith were relatives of Justus B. Smith, the testator, and complainant's grantors are the issue of such relatives, who survive the testator, and such issue took the respective shares of the estate of Justus B. Smith, given by the will, in the same manner as the said Lucy A. Bruce, Mary Bentley, and Jacob Smith would have done if they had survived the testator.

The decree of the court will be reversed, and the record remanded to the court below, where a decree will be entered in accordance herewith.

The other Justices concurred.

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WILLIAM F. ASHOFF v. FREDERICK J. VAN BRUNT AND FRANCIS LAMUNION.

Land contract—Purchase price—Promissory note as security—Merger—Release of surety.

The vendor in a land contract took the note of the vendee, which was signed by a surety, as security for the payment of the first installment due on the contract, after which he conveyed the land and delivered the note to his grantee, who paid him the full purchase price named in the contract. The grantee then purchased from the vendee his interest in the land, and the contract was surrendered to him, after which he conveyed the land by warranty deed, and sold the note, then past due, and the purchaser sued the maker and surety. And it is held that on the surrender of the contract the entire interest in the land merged in the vendor's grantee, who conveyed the land by warranty deed, and could not thereafter maintain any action against the vendee to recover any portion of the purchase price under the contract, nor against the vendee and the surety upon the note, and the plaintiff, having purchased the note after maturity, stands in no better position than said grantee.

Error to Berrien. (O'Hara, J.) Argued January 16, 1891. Decided February 27, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

C. B. Potter, for appellant.

Lawrence C. Fyfe and *John A. Watson,* for defendant Lamunion.

CHAMPLIN, C. J. Plaintiff brought suit on a promissory note signed by defendants, and the circuit judge directed a verdict for defendant Lamunion.

Briefly stated, the facts are that on September 9, 1886,

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one Green sold a parcel of land to Van Brunt, by land contract, for $1,350. The contract provided that $200 should be paid November 1, 1888, the balance at different specified periods in the future. Van Brunt, having no money with which to make a payment down, gave Green a note, signed by himself and Lamunion, due on or before November 1, 1888, and dated September 9, 1886, which was the date also of the land contract. The note was in form joint and several; but it is claimed by Lamunion that he signed it purely as an accommodation for Van Brunt, and that Mr. Green knew such to be the fact. This is admitted by Green. It appeared from the testimony of defendant Lamunion that Green had offered to pay him $50 if he would bring him a purchaser of the land, and that he brought Van Brunt. But the sale could not be consummated without a payment down of $200, and to accomplish the sale and so entitle him to the $50 he signed the note with Van Brunt for $200, which Green received as the down payment, payable November 1, 1888. The plaintiff, on the contrary, claims, and he introduced testimony tending to show, that the payment of this $50 was received by Lamunion as a consideration or inducement to sign the note. Green testifies that he received the note as and for the payment to be made down by Van Brunt, who went into possession of the land, which was improved, used it, and made some improvements thereon. The note has not been paid.

In March, 1888, one Johnson purchased from Green the note and land covered by the contract, subject to the rights of Van Brunt thereunder; and Green gave Johnson a deed of the land, and delivered the note to him, and at the same time, as he testifies, he informed Johnson that Lamunion was merely a surety on the note. It appears that Johnson made the purchase with a view to sell to one Terry, and that Terry would not buy unless

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he could have the land free and clear of Van Brunt's claim; and that, the next day after buying of Green, Johnson and Terry went to Van Brunt's, and Johnson purchased his interest in the land and an agreement to deliver possession by April 10 for the sum of $45, which was paid by Johnson, and Van Brunt surrendered his contract to him. This was on March 14, 1888. The next day he sold and conveyed the premises to Terry. Van Brunt surrendered possession to him at or prior to the time agreed upon. When Green sold the land to Johnson he required him to pay the full price for the land, and take the note to collect. Johnson took the note, and paid Green the full price for the land. Lamunion was not consulted. Johnson kept the note, which was not due at the time of his purchase, and, after it was due, sold it to the plaintiff for a valuable consideration, who brought suit against the makers. Van Brunt did not defend. It should further be stated that the contract was drawn requiring the payment of the whole purchase price, viz., $1,350; and that the first payment to be made was $200, on or before November 1, 1888, which is the same time of payment stated in the note; and that no indorsement of any payment was made upon the contract.

The plaintiff's counsel, in effect, requested the court to charge the jury that upon the undisputed testimony in the case the plaintiff was entitled to a verdict. The court refused, and directed a verdict for defendant Lamunion. Counsel for plaintiff bases his request upon the testimony of defendant, and claims that Lamunion is not an accommodation maker for the reason that he received a consideration for signing the note; that he was to receive $50 from Green if he brought him a purchaser; that Green required a payment down of $200, and would not

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sell on other terms; that to effect the purchase, and so entitle himself to the $50, he volunteered to sign the note, which Green says he received as a down payment. The testimony bearing upon the question whether Lamunion signed the note as surety and for the accommodation of Van Brunt, when duly considered, leaves no room for doubt that the intention of the parties was that he should stand in the relation of surety, and the note was merely a security for the first payment provided for in the contract. The contract represented the whole purchase price of the land. No indorsement or deduction was made because of the note. It was the purchase price named in the contract for which Green sold the land to Johnson, and Van Brunt was obligated to pay the whole price to Johnson, according to its terms. The interest of Van Brunt in the land was merely a possessory right secured by the contract, subject to the payment of the entire purchase price and interest thereon. He sold that right and interest to Johnson for $45, and surrendered his contract. The entire interest then merged in Johnson, who conveyed the land by warranty deed to Terry. Johnson could not thereafter maintain any action against Van Brunt to recover any portion of the purchase price under that contract; neither could he against Van Brunt and his surety upon the note given to secure the payment of a portion of the purchase price. Plaintiff, being a purchaser of the note after maturity, stands in no better position than his vendor, Johnson.

It follows that the judgment should be affirmed.

The other Justices concurred.

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SIMEON V. KENT v. JESSE B. COLE.

[See 77 Mich. 619; 79 Id. 159.]

Assault and battery—Evidence—Impeachment—Self-defense.

1. Where a plaintiff in a civil suit for assault and battery admits on cross-examination that he used abusive, insulting, and profane language towards the defendant prior to the assault, he may give the language used on his redirect examination.
2. A defendant in a trespass suit for assault and battery may be asked, for the purpose of impeachment, if he has not stated, at a given time and place, to a designated person, that he meant to have killed the plaintiff, and if he had it to do over again he would kill him.
3. A defendant in a civil suit for assault and battery who claims to have acted in self-defense must satisfy the jury that he acted honestly in using force to repel the attack of the plaintiff, and in determining that question they are to consider the reasonableness of the means made use of.[1]

Error to Ingham. (Peck, J.) Argued January 9, 1891. Decided February 27, 1891.

Trespass for assault and battery. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith & York, for appellant.

R. A. Montgomery, for plaintiff.

MCGRATH, J. This is an action of trespass for assault and battery. The parties met in the evening, at a writing school, and had some words. On the way home plaintiff continued to use harsh language towards defendant, and as the parties neared defendant's home an altercation took place in which the plaintiff was beaten,

[1] See *People v. Lennon*, 71 Mich. 298; *People v. Macard*, 73 Id. 15.

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bruised, and seriously injured. As usual, in this class of cases, the testimony was conflicting, each party insisting that the other was the aggressor, and defendant claiming that he was acting in self-defense, and called to his assistance his two sons.

1. Upon the trial plaintiff was asked, upon cross-examination, if he had not at the school-house, and on the way home, used abusive, insulting, and profane language towards defendant, and he replied that he had. On redirect examination plaintiff's counsel asked him to state just what language was used, and under defendant's objection the witness was allowed to give the language. The admission of this testimony is alleged as error. We think that its admission was not only proper, but that it was not prejudicial to defendant's case, as its only possible effect was to show provocation, and thus reduce the verdict.

2. Defendant, on cross-examination, was asked, under objection, if he had not stated, at a given time and place, to one King that he (defendant) meant to have killed plaintiff, and if he had it to do over again he would, and replied that he had not. The object of the question as stated by plaintiff's counsel was to prepare the way for impeaching the witness, and for that purpose it was clearly admissible.

3. The defendant claims further that the court erred in his charge to the jury in stating the rule governing the force that may be used in repelling an attack.[1] The court charged the jury very fully and particularly upon this question, and although there may be sentences which without the context might seem to be erroneous, yet as

[1] Counsel cited *People v. Doe*, 1 Mich. 451; *Hurd v. People*, 25 Id. 405; *Burden v. People*, 26 Id. 162: *People v. Lilly*, 38 Id. 270; *Brownell v. People*, Id. 732; *Galbraith v. Fleming*, 60 Id. 403; and upon the question of excessive force when the assailant continues the contest, *People v. Pearl*, 76 Id. 207; *Smith v. Simon*, 69 Id. 481.

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a whole the charge states the correct rule of law. The court said:

"In defending himself against an unlawful attack of another, a man is justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of the danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend one's self; that is the object to be attained, and a man is only justified in using such an amount of force *as may appear to him at the time* to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. * * * If he uses a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault.

"It is proper for you also to consider, if you find that the plaintiff made the first attack, that the defendant, Cole, being required to act at once, in the excitement and heat of an affray, could not be expected to exercise that nice discretion and accurate judgment which a jury by a careful sifting of the testimony of all the witnesses, aided by the arguments of counsel and the charge of the court, would be able to do; and therefore his conclusion, though he acted honestly and in good faith, might not be perfectly correct and just. Therefore this is the law, that if the defendant did use more force than is actually necessary for self-protection, if you find that he sincerely believed at the time that he was using only so much force as was necessary for his own defense, and if you also find that he acted honestly and in good faith in coming to that conclusion, and if you find also from the evidence that such a belief was a reasonable belief on his part, under the circumstances that surrounded him at the time, and as the situation appeared to him,—then he would not be guilty of an assault by reason of the use of such excessive force. * * * The defendant would be justified in resorting to such reasonable force as to him seemed to be necessary in the honest exercise of

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his judgment to protect himself from the injury which he fully believed the plaintiff was about to inflict upon him. * * * If you find such appearances justified that belief, and Mr. Cole's judgment was honestly exercised in coming to that conclusion, he would then have a right to at once repel or prevent the actual assault, using such force, and such alone, as was reasonably necessary, or appeared to him as reasonably necessary, at the time to protect himself.

"In the defendant's sixth request, gentlemen, I am asked to say to you that the defendant was the best judge of what was necessary to defend himself against Kent's attack and all the means to be used for his own protection. As a technical legal proposition that is undoubtedly correct, and it is true not only as a matter of law, but as a matter of common sense, that the party attacked is obliged, in the very nature of the case, to exercise his best judgment at the time as to what shall be done in his own defense, and his judgment is the one which, if honestly exercised, is to a large extent controlling. It would be absolutely controlling unless the jury should find that his exercise of it at the time and under the circumstances was such an exercise as was unreasonable under all the evidence in the case."

In other words, it must appear to the jury that the party using force to repel an attack acted honestly, and the jury, in determining whether he acted honestly, are to consider the reasonableness of the means made use of.

There is no error in the record, and the judgment below is affirmed, with costs of both courts.

The other Justices concurred.

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THOMAS COWAN v. THE MUSKEGON RAILWAY COMPANY.

Negligence—Street railway companies—Pleading—Cause of action.

A street railway company is not guilty of negligence in excavating and throwing up earth in the street while engaged in repairing and laying its track; and a declaration, in which the plaintiff claims to recover damages for injuries to his carriage by reason of its being driven onto such an obstruction and capsized, which fails to aver that the earth was allowed to remain in the street for an unreasonable time, or in the night-time, or without lights or barriers as warnings, and which fails to aver that the driver was exercising due care, fails to set forth a cause of action.

Error to Muskegon. (Dickerman, J.) Argued January 9, 1891. Decided February 27, 1891.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

DeLong & O'Hara, for plaintiff.

McGRATH, J. Defendant company owns and operates a street railway at Muskegon. On October 20, 1889, it was engaged in extending and laying its tracks, and had excavated and dug up the ground on Lake street, and had thrown up quantities of dirt and rubbish into the street adjoining its tracks. Plaintiff's buggy was being driven upon the street in the night-time, and, coming upon one of these heaps of dirt, was capsized and injured, and plaintiff brought suit in justice's court, recovered in that court, and defendant appealed to the circuit court, where plaintiff again recovered.

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Plaintiff's declaration is in writing, and is as follows:

"*Muskegon County—ss:*

"Thomas Cowan, plaintiff herein, by DeLong & O'Hara, his attorneys, complains of the Muskegon Railway Company, a corporation duly organized and existing under the laws of the State of Michigan, defendant, duly summoned in the plea of trespass on the case, for that, whereas, the defendant heretofore, to wit, on the 20th day of October, 1889, was the owner and in possession of a line of the street-railway track in certain streets of the city of Muskegon, to wit, on Lake street, in said city; and, being the owner and in possession thereof, said defendant, on the day and year last aforesaid, for the purpose of laying track and making other improvements in and upon the said line of railway and track, graded and excavated and dug up the ground on said Lake street, and carelessly and negligently piled and threw up a large amount of dirt, rubbish, and ground, so that the same became and was dangerous for the driving of teams and vehicles.

"Plaintiff further avers that on the day and year last aforesaid he was the owner of a certain top carriage, which he on said day let or hired to one Richard Call; that he, the said Richard Call, took said carriage, to which was hitched a certain horse of the said plaintiff; and he, the said Call, drove said horse and rode in said carriage past and upon said Lake street, which said Lake street was a public street and a public highway in said city; and while the said Call was driving said horse and riding in said carriage, and driving the same in a careful and prudent manner, and without any knowledge that the said dirt and rubbish was so piled and thrown up in said street, and without any fault upon the part of said Call, he, the said Call, drove said top carriage upon and against said piles of rubbish and dirt, by means of which said carriage was overturned, broken, and injured, so that the same was damaged in a large sum, to wit, in the sum of thirty dollars, to the damage of the said plaintiff, thirty dollars. Therefore he brings suit."

Defendant pleaded the general issue. The accident occurred in the night-time. Two ladies were with Call in the buggy at the time. Call and one of the ladies

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occupied the buggy-seat, and the other lady, who was about 17 years of age, sat between the other two, and was driving at the time of the accident. They had driven along the street twice before on the same evening, without accident; and Call, who was driving on these occasions, had noticed these obstructions. Call testified that there was no light of any kind at the obstruction, and defendant had given testimony tending to show that lights had been placed upon it. At the close of plaintiff's proofs defendant asked the court to direct a verdict for defendant, but the court refused so to do. At the close of the proofs defendant asked the court to instruct the jury:

"1. The plaintiff, in his declaration, does not complain of or allege any neglect of duty on the part of defendant for failing to erect and maintain barriers or danger signals or lights, and there can be no recovery by the plaintiff for any injury sustained in consequence of the omission of such duty.

"2. The testimony on the part of the plaintiff does not establish the case set out in the declaration, and your verdict should be for the defendant."

The court refused these requests, and error is assigned upon the refusal of the court to direct a verdict, and also upon the refusal of the court to instruct the jury as requested.

We think the court should have directed a verdict for the defendant. In the ordinary course of operating its street railway the defendant was engaged in repairing and laying its track, which it had the undoubted right to do; and it was not negligence for it to excavate and throw up earth while thus engaged. The proofs do not show that the earth was allowed to remain there for an unreasonable time, nor does the declaration allege that it was allowed to remain there in the night-time, or without lights or barriers. Again, the declaration avers that

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Call was driving at the time of the accident, while the proofs showed that the young lady was driving, and the declaration contains no averment that she was exercising due care. Not only is there a material variance between the declaration and the proofs, but the declaration fails to set forth a cause of action.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

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THE WAYNE COUNTY SAVINGS BANK v. LEVI L. STOCKWELL AND FRANK A. KINNEY.

Highways—User—Abandonment.

1. A highway by user need not necessarily be of the statutory width, but it becomes such to the width and extent used.
2. A highway can be lost in whole or in part by non-user, but the portion kept in use will not be affected by the non-user of the remainder.

Appeal from Lenawee. (Lane, J.) Argued February 10, 1891. Decided February 27, 1891.

Bill to restrain defendants from closing up or in any manner obstructing an alleged highway. Defendants appeal. Affirmed. The facts are stated in the opinion.

Andrew Howell, for complainant.

Millard, Wood & Bird, for defendants.

MORSE, J. The bill in this case was filed to restrain the defendants from closing up or in any manner obstructing an alleged public highway in the township of

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Medina, in Lenawee county, known as the "Savage Road;" it being claimed that the said highway was duly laid out in 1840 four rods in width, commencing at a point on the east side of section 13 in said township, and running to the quarter-post standing on the west side of the section. It is not deemed necessary for the purposes of this case to give here the particular survey of the road made in 1840.

Between sections 13 and 14 there runs a highway, north and south. The defendant Stockwell owns land for eighty rods east of this highway upon the north side of the east and west quarter line of said section 13, and Frank A. Kinney for the same distance upon the south side. East of the lands of Kinney are the lands of the complainant, known as the "Old Savage Farm." It is claimed in the bill that this highway known as the "Savage Road" ran upon this east and west quarter line to the center of the section near the west bank of a stream known both as "Tiffin River" and "Bean Creek." It is alleged in the bill that this highway was opened on this quarter line as far as Bean creek very soon after it was surveyed and established, but the part of the road east of said creek was never opened or worked, and no bridge was ever built across the creek. The bill further alleges that the road from the west section line of 13 through to said creek has ever since been opened, used, and traveled as a public highway, and for over 40 years has been recognized as such by the public and the township authorities, and has been kept open to the width of from 2½ rods to 3 rods; that about 15 years before the filing of this bill this road and the lands adjacent to it were set off into a road-district, and called "Road-district No. 42," and ever since then the lands have been assessed for highway labor upon said road, and a pathmaster elected each year until the one in which this bill was filed; that there has never

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been any other road or highway, public or private, giving ingress and egress to and from the said Savage farm, now owned by complainant, and that said Savage road is the only way out from and in to this farm.

It very clearly appears from the testimony that this road was laid out by the highway commissioners of Medina; the survey being made March 26, 1840, and recorded April 2, 1841. Whether such establishment conformed in every respect to the statutes then existing is not material, in our view of the case. The testimony shows plainly that the road was opened and worked, as claimed by the bill, as far east as Bean creek; that the then owners of the premises now occupied and owned by defendants, Stockwell and Kinney, when they cleared and worked their lands, built their fences so as to leave this road open to the width of from 2½ to 3 rods, the center of the same being the quarter line. From that time—a period of over 40 years—this road has been universally recognized and treated by the public as a highway,—most of them regarding it as a public way, and the others, as they testify, supposing it was a private way for the benefit of the Savage farm; it being called sometimes the "Savage Road," and sometimes "Savage Lane." It formed by itself a road-district, and work was done upon it. In 1884, the commissioner of highways undertook to discontinue it as a public highway, but the proceedings are not relied upon as being effectual lawfully to do so. There is no doubt in our minds that this road has become a highway by user, and that the fencing up and obstructing of it by the defendants in the spring of 1888 was unlawful, and rightfully enjoined by the court below.

The answer of the defendants relied almost entirely upon the claim that the road had never been fully opened, being, as shown by the testimony in their behalf,

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at different times fenced up and otherwise obstructed at various places. The circuit judge found and decreed that a public highway existed 2½ rods in width, of which the east and west quarter line was the center, and that the same extended from the quarter stake in the highway running north and south between sections 13 and 14, along the said quarter line to the north-west corner of the lands owned by complainant, which would be 1½ rods off from the lands of each of the defendants. The defendants were ordered to remove all obstructions placed by them in such highway, and also forever enjoined and restrained from hereafter obstructing, encroaching upon, or in any wise interfering with said highway, so as to impede the full and free use of the same as a public highway.

It was shown that, when Savage lived upon his farm, at several different times he temporarily put fences across the road on his own premises to keep his cattle or stock from getting out, so that he could pasture or water them in the highway, and connected with some of his fields. There was at one time a temporary fence, with a pair of bars, at the extreme west end of the road, and between the lands now owned by the defendants; but there can be no serious contention that this road, in so far as it has been declared a highway by the decree of the court below, was ever abandoned or went into disuse, or that it was not understood by all to be a highway with which the land-owners could not interfere to prevent public travel upon it. It was recognized as a public highway in 1884 by the petition and other proceedings taken to discontinue it; and one of the defendants testifies that he did not meddle with it until 1888, because he supposed that it was a road, until he was advised, about that time, by a lawyer, that it was not. A very similar case to the one before us is *Nye v. Clark*, 55 Mich. 602.

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We do not think it necessary to discuss or state the evidence in detail. We are all satisfied that a road,—a public highway,—as found by the circuit judge has long been established by user. It is not necessary that a highway established by user should be of the statutory width of four rods. A highway by user becomes such to the width and extent used. *County of Wayne v. Miller,* 31 Mich. 447, 449; *Lyle v. Lesia,* 64 Id. 22; *Scheimer v. Price,* 65 Id. 638; *Kruger v. Le Blanc,* 70 Id. 76; *Pratt v. Lewis,* 39 Id. 7, 12; *McKay v. Doty,* 63 Id. 581.

There is no doubt that an attempt was made to lay out this highway four rods wide, and across the whole of the section. The fact that no part of the highway east of Bean creek was ever used, or that a portion of it was shut up and abandoned west of the creek, or that the part of it running between the lands of Stockwell and Kinney was reduced to a width of two and one-half rods, would not destroy the right of the public or the complainant to preserve the use of such portion as had been for so long a time used as a public highway. A highway, or any portion of it, can be lost by non-user, but that will not affect the portion kept in use. *Gregory v. Knight,* 50 Mich. 61, 64; *Lyle v. Lesia,* 64 Id. 22; *Coleman v. Railroad Co.,* Id. 163.

The decree of the court below is affirmed, with costs.

CHAMPLIN C. J., MCGRATH and GRANT, JJ., concurred. LONG, J., did not sit.

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HENRY C. HAYWARD v. AMOS A. KINNEY AND LUCINDA M. KINNEY, IMPLEADED WITH FRANCIS H. STRONG AND GEORGIA A. HAYWARD.

Mortgage — Foreclosure bill — Parties—Laches —Life-estate— Condition subsequent.

1. A purchaser of mortgaged premises at an execution sale is a proper party defendant in a suit for the foreclosure of the mortgage.
2. There is no reason for making the holder of a tax title on mortgaged premises a defendant in a suit for the foreclosure of the mortgage, and where the complainant fails to show any other claim on his part the bill will be dismissed, with costs, as to such a defendant.
3. Where in a foreclosure suit a defendant, in addition to claiming rights in the mortgaged premises as a subsequent purchaser at an execution sale, claims under tax titles, which cannot be litigated in said suit, no writ of assistance will be awarded to put him out of possession of the mortgaged premises.
4. A condition following the grant of a life-estate in land, prohibiting its conveyance by the grantee, is held in this case to be a condition subsequent, if effectual for any purpose, and to defeat the estate to which it is annexed only at the election of him who has a right to enforce it.
5. Twelve years, six months, and ten days after the maturity of a mortgage the owner commenced foreclosure proceedings by advertisement, under which he received a sheriff's deed, and in default of redemption brought ejectment to recover possession of the mortgaged premises, and recovered a judgment. After a new trial was granted, he *for the first time* discovered that the mortgage contained no power of sale, whereupon he sought to discontinue the suit, but the court allowed it to be prosecuted in the interest of certain beneficiaries under the mortgage, who discontinued it six months and twelve days prior to the expiration of twenty years from the maturity of the mortgage debt, and three months and eight days after such discontinuance the owner filed a bill to foreclose the mortgage, in which he alleged the foregoing facts, which are held sufficient to excuse the delay in commencing such foreclosure suit.

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Appeal from Lenawee. (Loveridge, J., presiding.) Argued January 14, 1891. Decided February 27, 1891.

Bill to foreclose a mortgage. Defendants Kinney appeal. Bill dismissed as to defendant Lucinda M. Kinney, with costs, and decree affirmed as to defendant Amos A. Kinney, but no writ of assistance to be awarded to put him out of possession of the mortgaged premises, which he claims by a paramount title. The facts are stated in the opinion.

D. B. Morgan and *J. F. Welch*, for complainant.

Millard, Wood & Bird, for appellants.

CHAMPLIN, C. J. The bill in this case was filed to foreclose a mortgage executed by Francis H. Strong and Georgia A. Strong, his wife, to Israel Hall on November 10, 1866, to secure to the said Israel Hall the payment of the sum of $1,500 mentioned in a promissory note of even date with the mortgage, with annual interest thereon.[1] This mortgage was duly acknowledged, and recorded in the office of the register of deeds for the county of Lenawee on November 16, 1866, and purported to sell and convey unto Israel Hall, as the party of the second part, the S. W ¼ of the S. E. ¼ of section 21, township 8 S., range 2 E., Michigan.

The bill of complaint sets forth that on or about February 23, 1882, Israel Hall assigned said mortgage to the complainant in this suit for the use and benefit of Zackra E. Strong and Olive May Strong, children of the said Georgia A. Strong, one of the mortgagors mentioned in said mortgage, together with the note and all moneys then due and the interest that might thereafter grow due on said note and mortgage, which assignment

[1] The note matured November 10, 1869.

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was duly acknowledged on February 23, 1882, and was recorded on the 25th of that month.

The bill further states that on June 18, 1866, the said Francis H. Strong, one of the parties of the first part in the said indenture of mortgage, and Joseph T. Strong, Chester W. Strong, and Gertrude J. Cole were the owners in fee and tenants in common of the said premises, and on the date last mentioned Joseph T. Strong and his wife, Chester W. Strong, and Gertrude J. Cole, for the consideration of $1,000, executed and delivered to Francis H. Strong a certain quitclaim deed, thereby granting and selling unto the said Francis H. Strong all their right, title, and interest in and to the said premises, to have and to hold the said premises with the appurtenances unto the said Francis H. Strong, the party of the second part in said deed mentioned, during his natural life-time, and his heirs and assigns of his heirs, forever, but not to be conveyed during the life-time of the said Francis H. Strong; that this deed was duly acknowledged on June 18, 1866, by the grantors, and was recorded on July 2, 1866, in the office of the register of deeds of said county of Lenawee.

The complainant further states that the said indenture of mortgage before mentioned, executed by the said Francis H. Strong and Georgia A. Strong, his wife, to the said Israel Hall, was given upon and intended to cover all the right, title, and interest of the said Francis H. Strong and Georgia A. Strong in and to the said premises described therein; that said Zackra E. and Olive May Strong, in the said assignment of mortgage mentioned, are the sole and only issue of the said Francis H. Strong and Georgia A. Strong; that both are living, and are under the age of 21; that about January 1, 1878, said Francis H. Strong left and abandoned his children with-

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out providing them any means whatever for their education, support, or maintenance, and has ever since persisted in so deserting them, and has wholly neglected and refused to provide anything whatever for them; that the said mortgage was assigned to the complainant by the said Israel Hall for the use and benefit of said children, in order that the complainant might collect the same and apply the proceeds thereof for their use and benefit; and that the same was and is the only means from which support can be provided for them.

The complainant further sets out that this mortgage so assigned to him contained no power of sale, as required by the laws of the State, to authorize its foreclosure by advertisement, and that the complainant, being entirely mistaken and misled by ignorance of this fact, on May 20, 1882, commenced proceedings to foreclose the mortgage by advertisement, prosecuted the same to sale, and became the purchaser thereat, and received the sheriff's deed therefor; that the deed so received was acknowledged on August 28, 1882, and recorded on August 29 in the office of the register of deeds of Lenawee county; and that he supposed that the proceedings to foreclose said mortgage by advertisement were regular, valid, and binding in law. Complainant also states that on December 7, 1883, said Georgia A. Strong, by the name of Georgia A. Hayward (she having in the mean time married the complainant), in order to protect her children as the beneficiaries under said mortgage, executed a quitclaim deed of the premises to the complainant in trust for the use and benefit of said children; that said deed was duly acknowledged, and was afterwards recorded on November 14, 1884, in the office of the register of deeds of Lenawee county. The bill also sets out that previous to the execution of said deed by Georgia A. Hayward she had

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acquired a tax title upon said premises by deed from Charles M. Croswell, who had obtained the Auditor General's deed for the taxes of 1867; but it further states that such deed, on account of errors in the assessment of said taxes of 1867, was absolutely void, and that no title whatever in and to said lands by virtue of said deed vested in the said Georgia A. Strong, now Hayward.

Complainant further states that the mortgaged premises had not been redeemed from the sale, and he, still being mistaken and utterly ignorant of the fact that the mortgage contained no power of sale, and honestly believing the foreclosure proceedings valid, brought ejectment to obtain possession of the land in the circuit court for the county of Lenawee against the defendants Amos A. Kinney and Andrew Church and Charles Church, who were then in the possession of the premises, holding the same adversely to the complainant under claim of title; that issue was framed in said suit, and recovery had in favor of the plaintiff therein; that, before the time fixed by the statute had expired, a new trial of the cause was obtained by the defendants, and he, having then discovered the fact that the mortgage did not contain a power of sale, ordered the ejectment suit to be discontinued; that the court refused to do so, for the reason that the beneficiaries of the mortgage appeared by another attorney, and asked leave to prosecute the suit, and that the suit resulted in a verdict and judgment for the complainant; that for some season, which the complainant does not explain, the suit was finally discontinued before the commencement of this suit to foreclose the mortgage[1]. The complainant further expressly charges that up to the time he withdrew from said cause he prosecuted said ejectment suit in utter ignorance of the mistake as to his title to the mortgaged

[1] This suit was commenced February 23, 1884, and discontinued April 29, 1889.

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premises for the recovery of which said ejectment suit was instituted, and that he honestly believed that his title to said mortgaged premises was perfect to the extent of the right, title, and interest of said Francis H. Strong and Georgia A. Strong therein, and that, had he not been misled in respect to said title, he would have foreclosed said mortgage in equity before the expiration of 15 years from the time the same became due.

Complainant further states that Francis H. Strong, one of the mortgagors, is not a resident of this State, and has not been for 11 years last past, and that he is credibly informed, believes, and charges that the said Strong is financially irresponsible, and has been ever since said note became due, and that the amount due to the complainant upon said note and mortgage, as trustee of said minor children, will be wholly lost as to said children unless the same is realized by the sale of the mortgaged premises by foreclosure; that the note which was delivered at the time the mortgage was executed was payable on November 10, 1869, and that there is now due and unpaid upon said note and mortgage the sum of $3,860, and that no proceedings at law have been had to recover the debt, or any part thereof, except as before stated.

Complainant further states that from an examination of the records of deeds and mortgages in the office of the register of deeds in the county of Lenawee it appears that Amos A. Kinney and Lucinda Kinney have, or claim to have, rights and interests in the premises described in said indenture of mortgage, or in some part or parts thereof, as subsequent purchasers, incumbrancers, or otherwise. The bill prays for a foreclosure of the mortgage in the usual form.

The defendants Amos A. Kinney and Lucinda Kinney demurred to the bill for want of equity, and for the reason that the bill had not been exhibited within 15

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years from the time the note and mortgage became due and payable, which demurrer was overruled, and thereupon they answered, admitting the execution and delivery of said note to Israel Hall, and the execution, acknowledgment, and recording of the assignment as stated in the bill, but neither admitting nor denying the execution and delivery of the mortgage therein referred to. They admit that the whole amount of said note according to its terms, is due and unpaid, and that proceedings were had to foreclose the mortgage by advertisement, as stated in the bill, and that such proceedings were void for the reasons stated in the bill. They admit also the commencement of the suit in ejectment, and the proceedings thereon, as stated in the bill, and the discontinuance of the suit. They admit that they have, and claim to have, rights and interests in the premises, and that such rights and interests were acquired by them subsequent to the date of said mortgage.

They aver that the defendant Amos A. Kinney has acquired all the right, title, and interest of the said Francis H. Strong under and by virtue of a sheriff's sale and deed under a judgment and execution against said Francis in a suit in the circuit court for the county of Lenawee, and also several tax titles under deeds made by the Auditor General of said State on sales of said premises, made pursuant to law, for delinquent taxes; and that the defendant Lucinda Kinney has also purchased the premises under a tax sale made by the Auditor General of the State for delinquent taxes, pursuant to law, and received a deed therefor. The answer is also coupled with a demurrer, based upon the ground that the bill was not filed within 15 years after the mortgage became due and payable, and that no payment had been made

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thereon. A general and special replication was filed to the answer of Amos A. and Lucinda Kinney.

The defendant Georgia A. Hayward answered, admitting the execution of the mortgage by herself and Francis H. Strong as charged in said bill of complaint, and the assignment thereof, and that no part of the mortgage has been paid, and that the sum stated in the bill was due as therein charged; and also admitting all other material facts charged in said bill.

Proofs were taken in open court before the Hon. Noah P. Loveridge, from which it appeared that Ralph P. Strong was at the time of his death the owner of the premises; that he died in the fall of 1864, leaving as his heirs at law four children, namely, Joseph T., Francis H., Chester, and Gertrude Strong, who was married to a man by the name of Cole. It was also proven that the widow of Ralph P. Strong is dead. The defendants Amos A. and Lucinda Kinney introduced in evidence several tax deeds of the premises, against the objection of the complainant's solicitor, and also the proceedings under the attachment suit set up in his answer. The circuit court entered a decree in favor of the complainant for the foreclosure and sale of the mortgaged premises.

Since the decree of the court below, the decision in the case of *McKisson v. Davenport*, 83 Mich. 211, having been brought to the attention of the solicitors for the defendants Kinney, they waive the position taken by them that the statute referred to in that decision applies to the case under consideration. But they insist, as do the solicitors for the complainant, that adverse claims and titles to land cannot be tried in a suit to foreclose a mortgage. The defendants' solicitors also insist that under the general rules of equity the mortgage has become stale, and that the statute of limitations should be applied to it.

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We do not think that this position is tenable. The complainant shows sufficient excuse for delay in filing this bill for the foreclosure of the mortgage.[1]

Defendants' solicitors further claim that the clause in the deed of the heirs to Francis H. Strong, reading as follows: "But not to be conveyed during the life-time of the said Francis H. Strong,"—operated as a restraint upon the right of alienation of Francis H. Strong, and therefore he could not give a valid mortgage upon the three-fourths of the premises conveyed to him by that deed, he only having a life-estate in three-fourths of the premises, and his right to convey being prohibited. These words, if effectual for any purpose, operate, and were evidently intended, as a condition subsequent. The deed created a life-estate merely in three-fourths of the premises, and the insertion of the words served to make that an express condition which at the common law was implied in every estate for life or years. 2 Bl. Comm. 153. Such a condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. No one entitled to enforce the condition has sought to defeat the estate granted to Francis Strong, and until this is done the mortgagee has a right to enforce his security to the same extent as if the condition were not contained in the deed.

The defendant Amos A. Kinney claims as a subsequent purchaser under an execution sale, but this is subject to the mortgage of the complainant, and he was properly made a party defendant. The complainant failed to show that Lucinda M. Kinney had any interest in the premises which was subject to his mortgage. The record discloses that she had a tax title upon the premises, which, the complainant must have known, could not be litigated in

[1] The bill was filed August 6. 1889.

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this suit, and there was therefore no reason for making her a party.

The bill will be dismissed, with costs, as to her. The decree of the court will be affirmed, with costs, as to the other defendant, and no writ of assistance will be awarded to put Amos A. Kinney out of possession of the premises, which he claims to hold by a paramount title.[1]

The other Justices concurred.

JOHN MORAN v. JOHN B. ROBERGE ET AL.

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Mortgage—Discharge—Good-faith incumbrancer—Foreclosure suit by holder of one of several notes.

A subsequent mortgagee, who takes his mortgage in reliance upon reliable information that a prior mortgage has been discharged, will be protected if it turns out that the mortgage was in *fact* discharged.

So *held*, where a mortgage was given to secure the payment of six promissory notes, described therein as of even date with the mortgage and as payable to the mortgagees, when in fact the *sixth* note belonged and was payable to a third person, who was not named in the mortgage. The *five* notes were paid, and the mortgagor presented a petition to the proper court, under Act No. 3, Laws of 1887, in which he set forth the mortgage, and stated that the debt secured thereby had been fully paid and satisfied, and prayed for an order discharging said mortgage. The statutory certificate of discharge was entered upon the journal of the court, and a certified copy recorded in the office of the register of deeds, after which the mortgagor conveyed the land, and his grantee mortgaged it to secure a loan, which was made in reliance upon the statement of the first mortgagor as to the discharge of the mortgage by the mortgagees, and the loss of the discharge, and upon an examination of the proceedings in the circuit court for its dis-

[1] He claimed under tax titles, as well as under the execution sale.

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charge. A suit was brought by the holder of the sixth note to foreclose the mortgage to satisfy said note, in which the first mortgagor and the assignee of the second mortgage were made defendants, and the record of the proceedings above mentioned was introduced in evidence. The first mortgagor testified that he obtained a discharge of the mortgage about a year after it was given through a certain attorney, who delivered it to him as such discharge, and that it purported to be signed by the mortgagees; and the attorney testified to the execution of the discharge by the mortgagees, which was in the ordinary form, and described the mortgage and where it was recorded, and that it was executed in Ohio, and was, as he thought, in accordance with the laws of Michigan, but that there was some question about the clerk's certificate, the exact nature of which he did not remember, and that he handed the discharge to the mortgagor just as it was. And it is held that the conclusion is irresistible that a full discharge of the first mortgage was executed and delivered, of which fact the second mortgagee had notice, which inured to the benefit of his assignee; and the complainant is permitted to proceed with the foreclosure, but subject to the second mortgage.

Appeal from Tuscola. (Beach, J.) Argued January 14, 1891. Decided February 27, 1891.

Bill to foreclose a mortgage. Defendant Wallace appeals. Reversed, and complainant allowed to proceed with his foreclosure against defendant Schram, but subject to the mortgage of the appellant. The facts are stated in the opinion.

Elbridge F. Bacon, for complainant, contended:

1. Where a note offered by complainant as the note secured by a mortgage agrees with the description contained in the mortgage in some respects, but differs in others, it may be shown by parol evidence to be the note intended to be secured; citing Jones, Mort. § 350; *Johns v. Church*, 12 Pick. 557; *Hall v. Tufts*, 18 Id. 455; *Goddard v. Sawyer*, 9 Allen, 78; *Tousley v. Tousley*, 5 Ohio St. 78; *Hurd v. Robinson*, 11 Id. 232; *Williams v. Hilton*, 35 Me. 547; *Jackson v. Bowen*, 7 Cow. 13; *McKinster v. Babcock*, 26 N. Y. 378; *Boody v. Davis*, 20 N. H. 140; *Bell v. Fleming*, 12 N. J. Eq. 13; *Duval v. McLoskey*, 1 Ala. 708; *Aull v. Lee*, 61 Mo. 160; *Stanford v. Andrews*, 12 Heisk. 664;

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Paine v. Benton, 32 Wis. 491; *Jones v. Indemnity Co.*, 101 U. S. 622; *Walker v. Sellers*, 11 Ind. 376; *Clark v. Houghton*, 12 Gray, 38.

2. The sixth note, being negotiable, and having been transferred to complainant for value before maturity, carried the mortgage with it, and he is entitled to maintain this action for its foreclosure; citing Jones, Mort. §§ 1377, 1378; *Martin v. McReynolds*, 6 Mich. 70; *Briggs v. Hannowald*, 35 Id. 474.

3. The position taken by the counsel for the appellant, that, even if the mortgage were reformed, still, as Tucker was not named as grantee, he could not enforce the security, cannot be maintained. One having any interest in a mortgage, either legal or equitable, may maintain a suit in equity to foreclose it; citing Story, Eq. Pl. §§ 201, 209; Wiltsie, Mort. § 112; Jones, Mort. § 1369; *Wall v. Bissell*, 125 U. S. 382; *Batesville Institute v. Kauffman*, 18 Wall. 151; *Waterman v. Webster*, 108 N. Y. 157; *Martin v. McReynolds*, 6 Mich. 70; *Wilkins v. Fry*, 1 Mer. 262.

4. The complainant, having shown his title to the note, and that it has not been paid, and that it is one of the notes secured by the mortgage, has made out a *prima facie* case against the defendants, and the burden of proof is upon defendant Wallace to show that, as against him, the mortgage is released or postponed to his security; citing *Spear v. Hadden*, 31 Mich. 265.

5. Act No. 3, Laws of 1887, is in conflict with the constitutional provision that no person shall be deprived of his property without due process of law, as no notice to the mortgagee or others interested in the mortgage of the hearing of the petition for discharge is provided for; citing Cooley, Const. Lim. 353 *et seq.*; *Parsons v. Russell*, 11 Mich. 113.

6. Conceding the act to be constitutional, the petition does not comply with the statute, which provides that it shall state the *facts* in regard to the payment of the mortgage debt, yet the only allegation in the petition is "that the debt secured by said mortgage has been fully paid and satisfied by the petitioner," which is not a statement of any fact regarding such payment, but of the conclusion of the petitioner that what he had done amounted to payment; citing *Ricketson v. Richardson*, 26 Cal. 149; *Forbes v. Hyde*, 31 Id. 342; *Zube v. Weber*, 67 Mich. 58; and, it being a special proceeding, the jurisdiction of the court to make the order for discharge must affirmatively appear; citing Freem. Judg. § 123.

7. The defendant, having shown the loss of the writing, was entitled to prove its contents by parol; but the testimony introduced for that purpose consists merely of the conclusions of the witnesses Roberge and Green as to what the instrument

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was, instead of showing its contents so that the court could construe it, and the testimony was incompetent, and had no tendency to show a discharge of the mortgage; citing 1 Greenl. Ev. § 558; *Zube v. Weber*, 67 Mich. 58; *Tayloe v. Riggs*, 1 Pet. 591; *U. S. v. Britton*, 2 Mason, 464; *Mariner v. Saunders*, 5 Gilm. 113; *Rankin v. Crow*, 19 Ill. 626; *Bennett v. Waller*, 23 Id. 97; *Sizer v. Burt*, 4 Denio, 426; *Edwards v. Noyes*, 65 N. Y. 125; *Russell v. Brosseau*, 65 Cal. 605; *Coxe v. England*, 65 Penn. St. 212; *Elwell v. Walker*, 52 Iowa, 256.

8. Defendant Wallace was not a *bona fide* purchaser as against complainant, so that his mortgage would be entitled to priority over complainant's lien. He possessed sufficient information to put him upon inquiry in regard to whether the mortgage had been paid and discharged, and is therefore chargeable with knowledge of the fact that it had not been paid; citing *Wilcox v. Hill*, 11 Mich. 256; *Converse v. Blumrich*, 14 Id. 109; *Hains v. Hains*, 69 Id. 581; *Oliver v. Sanborn*, 60 Id. 346.

9. Being a negotiable note not yet due, the defendant must have known it might have been assigned in the usual course of business, and might then be in the hands of an innocent holder for value, and he should have informed himself whether the outstanding note which the mortgage secured had in *fact* been paid; citing *Jones v. Smith*, 22 Mich. 360; *Keohane v. Smith*, 97 Ill. 156; *Vandercook v. Baker*, 48 Iowa, 199; *West's Appeal*, 88 Penn. St. 341; *Lee v. Clark*, 89 Mo. 553.

10. The mortgage having been recorded, all was done that was necessary to preserve the lien; and a delay of any period less than the statute of limitations, to make claim under it, did not impair the rights of complainant, either at law or in equity; citing Jones, Mort. § 558; *Dick v. Balch*, 8 Pet. 80; *Rice v. Dewey*, 54 Barb. 455.

Dickinson, Thurber & Stevenson, for appellant, contended for the doctrine stated in the opinion.

GRANT, J. Complainant was the holder of a promissory note for $114.37, secured by a mortgage on real estate, and filed his bill to foreclose the mortgage. Defendants Roberge and Schram were the makers of the note. The mortgage given as security was executed by Roberge to defendant Sweet and Asa Fuller. Defendant Wallace was made a party as a subsequent mortgagee. Decree was

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entered for complainant, and defendant Wallace alone appealed.

There is but little, if any, dispute as to the material facts in the case, which are as follows: October 15, 1879, Roberge and Schram bought from one John H. Tucker a saw-mill for $800. Fuller and Sweet had a claim upon it for $685.63. Roberge and Schram executed six promissory notes, aggregating $800, the total purchase price. Five of these notes were made payable to Fuller and Sweet, and the sixth, the note in question, to John H. Tucker. It was payable in three years from date, with interest at 7 per cent. The mortgage covered the six notes, which were described in the mortgage as—

"Six promissory notes, bearing even date herewith, executed by John B. Roberge and Alexander Schram to said parties of the second part."

The bill is in the usual form of a foreclosure bill, except that it alleges a mistake in the description of the note in question, and prays for a correction of the mistake. Tucker was present at the execution of this mortgage, was one of the witnesses to it, and shortly afterwards transferred the note to one Ransom Bartlett, who in turn sold and transferred it to complainant. There was written across the face of this note the words, "Secured by mortgage." Roberge and Schram sold a half interest in the mill to one John Hopson, and arranged with Fuller and Sweet for the payment of the first five notes by Hopson. Hopson paid them. The note in suit has not been paid; at least the testimony does not show this fact, and the burden of proof in this respect was upon the defendants. June 8, 1888, Roberge deeded the land to Schram, who on the same day executed a mortgage for $450 to one William Cooper. August 28, 1888, this mortgage was assigned by Cooper to defendant

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Wallace, who claims to be a *bona fide* purchaser without notice of complainant's note and his interest in the mortgage.

On December 20, 1887, defendant Roberge presented a petition to the circuit court for the county of Tuscola, in which he set forth this mortgage, and stated that the debt secured thereby had been fully paid and satisfied, and on the same day the court entered upon its journal a certificate that the debt secured by said mortgage was fully paid and satisfied, and ordered the same to be discharged, and declared fully paid and satisfied. This proceeding was in pursuance of Act No. 3, Laws of 1887 (3 How. Stat. § 5705). Schram applied to the firm of A. D. Slaght & Co. for a loan upon this land. Slaght & Co. acted as the agents for Mr. Cooper in effecting the loan. Before this loan was made, a member of this firm by the name of Carson saw defendants Roberge and Schram about the mortgage to Sweet and Fuller. He does not remember particularly what Schram said, but says Roberge told him—

"That he had obtained a discharge of the mortgage; that his house burned up, and that the discharge was burned in the house before it had been recorded."

Mr. Carson also saw the proceeding in the circuit court, and the action of the court in declaring the mortgage paid and ordering its discharge. No other efforts were made on behalf of Mr. Cooper to ascertain whether the Sweet and Fuller mortgage had been paid or discharged.

Whether or not this mortgage was in fact discharged depends upon the effect to be given to the testimony of defendant Roberge and John C. Green, whose testimony on this point it is necessary to give quite fully. Roberge testifies substantially as follows:

"I obtained a discharge of this mortgage about a year

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after I had bought of Sweet and Fuller. It got lost in the fire. It was in the trunk that burned up in that fire. I obtained the discharge through Mr. Green, an attorney. Mr. Hopson and Mr. Green obtained it for me. Green acted for me in procuring this discharge from Fuller and Sweet, and delivered it to me as a discharge of this mortgage. It purported to be signed by Sweet and Fuller. It was witnessed and acknowledged."

Mr. Green testified as follows:

"Fuller and Sweet executed a discharge of this mortgage to Roberge. I saw the discharge. It was drawn up in the ordinary form of a discharge, describing the mortgage, and where it was recorded. It was signed by Fuller and Sweet. I think I examined it to see whether it was properly executed. I think it was. They were in Ohio. I had the discharge made out for them to sign. I think the discharge was in accordance with the laws of this State, but I think there was some question about the clerk's certificate in Ohio,—something of that kind, but I don't remember just what it was now. I handed it to Roberge just as it was."

The only other evidence showing the discharge is a letter written by the witness Green on November 9, 1887, to the attorney who prepared and filed the petition for Mr. Roberge to secure the order of discharge from the court. It reads as follows:

"*My Dear Sir:* This man Roberge wants a mortgage discharged in your county. I got him a discharge in '81, and he kept it at home, and did not record it, and it was burnt up in the fire of '81; and, as I was the attorney for Fuller and Sweet, and got him the discharge, I am a good witness for him to satisfy the court, as I have no interest in the matter, and he resides in your county, and the court is handy for you; and by petition to the court he can get a legal discharge, as Fuller is dead. I think this would be the best way to clear off the mortgage, as Roberge's and my evidence would be sufficient. I am glad to hear you are in practice, and remain your friend."

Upon this evidence the conclusion is irresistible that a full discharge of this mortgage was executed and deliv-

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ered. Of this fact the second mortgagee, Mr. Cooper, had notice; and his assignee, the defendant Wallace, is entitled to the benefit of that notice. Subsequent mortgagees without notice may rely upon the evidence of discharge as shown by the record. A discharge is only conclusive as to those who purchase in good faith. A discharge may be recorded, and still the mortgage be not discharged. A subsequent mortgagee with notice of that fact will not be protected by the record. It is not necessary that the discharge be recorded in order to protect a subsequent purchaser or mortgagee. When such an one receives reliable information, upon which he relies, that a mortgage has been discharged, he will be protected if it turns out that the mortgage was in fact discharged. The defendant Wallace was so informed. He in good faith acted upon such information, and his rights, therefore, are paramount to those of the complainant.

There was nothing upon the record to show that any other person aside from Sweet and Fuller had any interest in the mortgage given to them. It is also quite apparent that there was no mistake in the mortgage itself. Tucker was present when the notes and mortgage were drawn, and they were evidently drawn in the manner they were with the full understanding of the parties. It follows, therefore, that complainant may proceed with his foreclosure as against Schram, but subject to the mortgage of the defendant Wallace, who will recover costs in both courts.

The other Justices concurred.

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KINGMAN & COMPANY (A CORPORATION) v. WILLIAM C. DENISON AND THE MCCORMICK HARVESTING MACHINE COMPANY (A CORPORATION).

Chattel mortgage—After-acquired property—Stoppage in transit.

1. The lien of a chattel mortgage covering all additions to and substitutes for the property described in the mortgage will not attach to goods ordered by the mortgagor before giving the mortgage, and which never actually came into his possession as owner.
2. At the time of the delivery of goods shipped to a merchant on his written order his store and stock were in the possession of an agent who represented several mortgagees, whose mortgages were given after the goods were ordered, and under one of which a sale was made at about the date of such delivery, and the goods bid in by one of the mortgagees, who remained in possession, and from whom, and the merchant, who was acting as agent for the mortgagee, a portion of the goods ordered were replevied by the vendor, who claimed the right to stop them in transit. And it is held that if the merchant was insolvent when he made the order, or became so at any time before the claimed delivery of the goods, and if they were never actually delivered to his possession, the vendor's rights were paramount to any acquired at the mortgage sale, which question of actual delivery was for the jury.

Error to Kent. (Grove, J.) Argued January 14, 1891. Decided February 27, 1891.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Taggart & Denison, for appellant.

Sweet & Perkins, for defendants.

LONG, J. On July 8, 1889, defendant Denison wrote the plaintiff at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the

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parties prior to that time. The plaintiff received the letter the next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11 the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiff taking shipping bill from the railroad company there, and on same day sending it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17, and on the 18th it turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made.

It appears that on July 9 the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10, 11, and 12 he gave mortgages on the same property to several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as its agent. The McCormick Harvesting Machine Company mortgage contained a clause, after a description of the property mortgaged, as follows:

"And all additions to and substitutes for any or all of the above-described property."

On September 7 plaintiff, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill.

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This draft was not paid, and on September 14 plaintiff wrote him for prompt remittance, which was not made. On September 19, 1889, plaintiff brought replevin against the defendants for the twine, finding about one-half of it; the balance having been sold out of the store by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiff for $351.91, the value of the twine taken, and costs. Plaintiff brings error.

The plaintiff asked the court to instruct the jury that plaintiff was entitled to a verdict; and in the ninth request asked an instruction that—

"If Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him."

And in the fourteenth request it was asked that the jury be instructed that—

"The McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a *bona fide* purchaser."

Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on July 18. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests *set out* were refused by the trial court, and upon such ruling the plaintiff assigns error.

The court, in its charge to the jury, stated:

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"Plaintiff claims the right to the possession of these goods at the time this suit was commenced—*First*, because, as counsel claims, the goods were ordered, were purchased, by Mr. Denison at a time when he was insolvent, and knew that he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and the plaintiff's counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts of this case as shown by the evidence, has no application whatever; there is no such right existing."

This part of the charge relating to the right of stoppage in transit is assigned as error.

The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case.

The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. *Gibson v. Carruthers*, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vendor and vendee in process and for the purpose of delivery; and this right may be exercised whether the insolvency exists

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at the time of the sale, or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. *O'Brien v. Norris*, 16 Md. 122; *Reynolds v. Railroad Co.*, 43 N. H. 580; *Blum v. Marks*, 21 La. Ann. 268; *Benedict v. Schaettle*, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. *Harris v. Pratt*, 17 N. Y. 249.

In the present case it appears that the goods arrived in Grand Rapids July 17, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and was in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed that by the terms of its mortgage it was entitled to hold the twine.

The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed

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that they passed to it under the terms of its mortgage. It, however, stood in no better position then Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. It does not stand in the position of a *bona fide* purchaser of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison.

These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendor's rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. *Underhill v. Booming Co.*, 40 Mich. 660; *Lentz v. Railway Co.*, 53 Id. 444; *White v. Mitchell*, 38 Id. 390; *James v. Griffin*, 2 Mees. & W. 623.

In the view we have taken of the case, we think the the other questions raised are unimportant, and we will not pass upon them.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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MARY A. DAVIDSON v. JOHN H. BENNETT.

Fraud—Question for jury—Costs.

1. Where the record is printed solid, and in such small type as to make its reading exceedingly difficult, the appellant will not be allowed costs.
2. In this case the judgment is reversed for the error of the court in deciding that plaintiff had been defrauded, which was a question for the jury.

Error to Saginaw. (Gage, J.) Argued January 15, 1891. Decided February 27, 1891.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Edward J. Bissell, for appellant.

Byron A. Snow, for plaintiff.

CHAMPLIN, C. J. This was an action of replevin commenced in justice's court to try the title of the plaintiff to a span of horses.

The defendant justified his right to possession under a certain chattel mortgage executed by Alfred Davidson and his wife, the plaintiff, to the Groton Bridge & Manufacturing Company, dated August 20, 1888, to secure the payment of $170, November 1, 1888, with interest. The plaintiff was not named in the body of the instrument as a party thereto, but signed her name to it under the name of her husband. She claimed and gave testimony which tended to prove that the horses were her separate property, and that her signature to the mortgage was obtained through fraudulent misrepresentations made to her to induce her to sign the instrument. The so-called

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note, which the mortgage was given to secure, was in the words and figures following:

"$170.00. CHESANING, MICH., AUG. 17, 1888.

"On or before the FIRST day of NOVEMBER, 1888, WE, of SAGINAW county, State of MICHIGAN, promise to pay to the order of the Groton Bridge and Manufacturing Company ONE HUNDRED AND SEVENTY dollars at the STEWART BANK, Owosso, for value received, with interest at SEVEN per cent. to maturity, and SEVEN per cent. per annum on principal and interest from maturity until paid.

"The express conditions of the transfer of the possession of the ENGINE, SEPARATOR, BELT, AND TANK, for which this note is given, are such that the title, ownership, or right of property does not pass from the said Groton Bridge and Manufacturing Company until this note, with interest, is paid in full. The said Groton Bridge and Manufacturing Company have full power to declare this note due, and take possession of said property, at any time they may deem this note insecure, even before the maturity of the same, and sell the said property at public or private sale, and apply the proceeds towards the payment of this note; and, should this note be collected by suit, the maker and indorser agree to pay all reasonable costs of collection, including plaintiff's attorney's fees.

[Signed] "A. DAVIDSON."

(The written portions are printed in small capitals.)

The court, in instructing the jury, said:

"I doubt very much whether any woman would, or ought to, secure on her separate property a debt where a contract was made such as appears in this note, between the vendor and the vendee; for it is virtually leaving the whole matter in the hands of the vendor,—title, right to declare the debt due, sale of the property at public or private sale, and in fact it is a provision that is very stringent indeed, so much so that I am surprised that any sane man would ever sign such a note. I therefore conclude that the failure to represent to her the clause in this note, and the representation to her of this mortgage, which would indicate that the note was simply an ordinary note, due in November, 1888, in the nature of the misrepresentation, and the failure to represent to her facts that ought to have been represented, I conclude

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that they amounted to a fraud upon her, and that she cannot be held as estopped in this case."

The testimony was not without conflict as to what representations were made, nor of the failure to represent to the plaintiff facts which ought to have been represented, and the court erred in taking the question of fraud from the jury, and deciding that the plaintiff had been defrauded himself. For this error the judgment must be reversed. The costs of this Court will abide the event of the new trial.

The record has been printed solid, and in such small type as to make it exceedingly difficult to read the record. Under such circumstances, the prevailing party will not be allowed costs.

The other Justices concurred.

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DAVID KINNEY v. FOLKERT C. FOLKERTS ET AL.

[See 78 Mich. 687.]

Master and servant — Negligence — Trial — Evidence — Measure of damages.

1. The legal questions presented by the record in this case, except as hereafter noticed, are held settled by the former opinion, reported in 78 Mich. 687.
2. The refusal of the court in a negligence case to permit the defendants to run a "blower" used in the planing-mill in which the accident occurred, and which the jury were permitted to examine, in their presence, is not an abuse of discretion, it appearing that its construction had been altered since the plaintiff was injured by putting his arm into it when in operation.
3. Testimony by which it is sought to corroborate witnesses as to

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the condition of machinery at the time of an injury, by showing in what condition the witness found it a week afterwards, is properly rejected.

4. Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases.

5. The charge of the court on the question of damages as measured by the life expectancy of the plaintiff is held not open to the objection that it misled the jury so that they gave plaintiff what he had lost by his inability to labor between the time of his injury and the trial, and then included the same time in their calculation as to his future loss.

Error to Alpena. (Kelley, J.) Argued January 15, 1891. Decided February 27, 1891.

Negligence case. Defendants bring error. Affirmed. The facts are stated in the opinion, and in 78 Mich. 687.

Frank Emerick (*J. C. Shields*, of counsel), for appellants.

Turnbull & Dafoe (*Depew & Rutherford*, of counsel), for plaintiff.

[Briefs confined to a review of the testimony and points stated in the opinion, no authorities being cited.—REPORTER.]

MORSE, J This case has been in this Court before, and will be found reported in 78 Mich. 687. A full statement of the facts, appearing on the first trial of the case, will be found in the opinion of Mr. Justice LONG, there published. Upon a second trial in the Alpena circuit court, the plaintiff has again recovered a judgment of $5,000, and the defendants bring error.

There is but little difference in the testimony of the two trials, and we shall refer only to such differences as are claimed by defendants' counsel, and such other facts

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as may be necessary in determining the question whether or not any error was committed on the last trial warranting a reversal of the judgment. The plaintiff's counsel insist that the whole case, upon the evidence, is substantially the same as upon the first trial, and that the law of our former opinion must govern the case now here. If it be true that there is no substantial difference in the case of the plaintiff as made by the testimony in his behalf on the two trials, then it must follow that the question as to his contributory negligence was properly submitted to the jury on the last trial, as we held that such question was rightfully submitted to them on the first trial. The only differences pointed out to us by defendants' counsel are two, to wit:

1. On the last trial plaintiff testified that he looked up as he went in to see if the blower was running, while on the first trial he did not say anything about looking at the blower for that purpose.
2. On the first trial he testified that he had the elbow of the pipe on his arm when he fitted it to the blower, while on this trial he says he fitted the pipe on the blower before he put his hand in.

As regards this last difference in his testimony, we cannot see that it would make any difference, as a matter of law, in his negligence, which statement was correct. The argument that he would be more liable to feel the suction of the blower in motion in the last case than in the first, and consequently be advised that the blower was moving, is one for the jury. I do not think that a court, some of whom never saw a blower, either stationary or in motion, are authorized to hold as a matter of positive law that plaintiff must have felt this suction in time to acquaint him of his danger and to prevent it. Nor do I think the records in both cases bear out the assertion that there was any difference in his statement in this respect between the first and last trial. See *Kinney v.*

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Folkerts, 78 Mich., at page 692, where plaintiff's direct testimony is quoted on the first trial. He says:

"We both run right in quick, and *I took this elbow and stuck it on the blower, and had the bolts in my hands, and jumped onto a horse, and run my hand right in the blower.*"

The plain inference from this testimony is that he put the blower on first, and then jumped upon the horse, and ran his hand into the pipe and into the blower.

In relation to his looking up at the blower as he went in, his testimony is that he took a "quick glimpse" at the machinery of the blower as he rushed in, and it looked just as he had left it. It must be remembered that the plaintiff, as he testifies, was out of the building at work. The blower had been stopped, and was not running when he left it. It was not to be run again until he had fixed the pipe, and he supposed that it was still. McNally, one of the defendants, while plaintiff was working under this supposition, comes to him, and says:

"Come in quick, we are out of shavings in the engine-room, *and I want to start that blower;* come in quick."

Plaintiff, again advised by this statement that the blower is stationary, rushes almost on a run into the mill, filled with the clash and noise of other machinery in motion, as well as the blower; casts a hurried glance upwards; everything seems all right, and as he left it, and he claps the pipe upon the opening of the blower, and runs in his hand to fit the bolts, and is injured. All this is the work of a moment, and under the idea that there was no danger; and there would have been none, if the blower had been in the condition he was led to suppose it was by the acts and *words* of one of the defendants. If the statement of the plaintiff is a true one, he was thrown off his guard, and it was for a jury to say whether an ordinarily prudent man would have

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done as he did under like circumstances; and the fact that he took a "quick glimpse" of the blower, as he rushed in in the hurry of the moment, cannot alter the case so as to take it out of our former ruling, that the question of his negligence was for the jury. The theory of the defendants, as opposed to the story of the plaintiff, is that the blower was not stopped at all that morning, and that plaintiff was not led in any way to believe that it was not running; that he had no call from McNally or any one to go near the blower, and yet that he deliberately walked into the mill, went around to the blower, got upon the horse, and, steadying himself with one hand, put the other, without any cause or known reason, into the opening of the blower, and thereby lost his fingers. Having to make a choice between these two theories as to the facts, it is not at all surprising to one having any knowledge of human nature that the plaintiff has recovered two verdicts.

The argument, which was the main contention here. that the plaintiff was negligent in law, must be considered, therefore, settled by our former opinion, and the question of fact has been settled by the jury. We also think that the negligence of the defendants was properly submitted to the jury, who have also settled that question against them.

The court permitted the jury to examine the mill, but would not allow the defendants to run the blower in their presence. As the blower was not constructed the same as when the plaintiff was injured, it having been altered considerably since that time, we think there was no abuse of discretion in the court's action. It is complained that the court erred in refusing the evidence offered to be shown by a witness, Henry Michaels. He was asked, after he had testified to the changes that had been made in the blower since plaintiff had been hurt, if,

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before such changes, and after October 15, 1888, the plaintiff being injured on the 8th, he had occasion to use and handle the blower. This was objected to, and then defendants' counsel offered to show by the witness that on October 15, 1888, and about a week after the accident to plaintiff, and when he came to defendants' mill for the purpose of investigating the blower,—

"He had occasion, in testing and using the blower, to put up and take down this box and elbow, and that he found it at the time fastened up there with nails, and used it in that way himself.

"*The Court:* Do you think that would be any evidence that it had been used in that condition prior to the 8th of October?

"*Mr. Emerick* (defendants' counsel): Yes, I do.

"*The Court:* I will give you an exception."

The defendants claimed that this temporary elbow or pipe, which the plaintiff claimed he was putting on the blower when he was injured, at the time was permanently fastened into a wooden box, thereby forming a continuous pipe about 7½ feet in length, which, if true, would preclude the plaintiff from running his arm through it, as he claimed he did, when he was attaching it to the blower. The plaintiff testified that the box was not attached to it when he used it. By this proposed testimony it was sought to corroborate defendants' witnesses as to the condition of this pipe and box on the day of the injury by showing how Michaels found it a week afterwards. The very statement of the proposition shows its absurdity. The court was right in rejecting it.

Plaintiff testified that, as soon as he was hurt, he threw down the elbow, and walked rapidly to where McNally was standing in the mill.

"I asked him whether he would walk up town with me to some doctor. I was not acquainted with the doctors, and he would oblige me to go up. Says I: 'We can take your horse.' Says he: 'No.' Says I: 'The team

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has just come in.' Says he: 'I haven't got time; you have got strength, go yourself.' The idea of that is he wouldn't be humane enough to go with me. He refused. He ought to have done it."

No objection was made to any of this testimony, and no motion made to strike it out, but the counsel for defendants requested the following charge in relation to it:

"Even if McNally did refuse to go with or send plaintiff to the doctor, that fact is immaterial, and should not be considered, except as bearing upon his credibility."

This conversation of plaintiff with McNally is denied by the latter, but it is claimed by defendants' counsel that this testimony of Kinney's was used by plaintiff's counsel on the argument to the jury to show that McNally was brutal and inhuman, in thus refusing to go with plaintiff to a doctor or to send his team with him. We find, however, nothing in the record to support this claim, and we cannot assume anything not found therein. The court made no allusion to this testimony in his charge, and did not give the request. The request was proper enough, but we cannot consider the failure to give it as prejudicial error. The damages found by the jury are not excessive, under the testimony, and the circumstance that juries have twice found with plaintiff, and for the same sum, seems to be conclusive that the failure to give this instruction had no weight in the determination of the case, as no complaint in reference to this testimony, or of any use made of it, was brought to our attention when the case was here before. And yet the result is the same on both trials, even to the amount of the damages.

The rule of damages was properly laid down. It is claimed that the court erred in counting the plaintiff's

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expectancy of life from the date of the injury instead of the date of the trial, a difference of one and one-half years; but it will be seen, by examining the charge, that the element of damage resting upon this expectancy of life reached back at least until the time when his hand had healed, and such damages were not permitted to be recovered twice, unless it might be for the time when he could do no work at all, which was about two months; but we do not think the charge is open even to this objection. The court authorized the jury to take into consideration three elements of damages:

First, what he had paid out for doctors' bills, medicine, and nursing; *second*, compensation for the pain and suffering.

As to the *third* element, the court said:

"You are also to consider, as a third element of injury for which the plaintiff would be entitled to recover, if you find for him upon the propositions of fact under the instructions given you, the loss of time and the disability occasioned by the alleged injury. The loss of time would consist in the actual loss from the time of the accident or injury until he was restored to health, or until the wound was healed. You should also consider the disability entailed by the accident, actual loss of his services, his inability to work, to attend to his ordinary business or trade, and you should consider the extent of his injury. To what extent does this injury deprive him from pursuing his avocation, and earning the usual compensation or wages therefor? * * * It is difficult, if not impossible, to give you any definite or well-defined standard from which to measure the loss or injury he may have sustained. The question as to what amount the plaintiff should be awarded rests largely in your sound discretion. You should consider, however, on this branch of loss and injury, the occupation of the plaintiff, his ability to earn wages before the accident or injury, and the extent to which such ability to earn wages has been diminished or lost to the plaintiff. You may consider the age of the plaintiff and his reasonable expectation of life, which is shown by the evidence to be 36

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years; also his habits of industry and temperance. You should also consider the contingencies of a much shorter life. The plaintiff may not live to the full period of expectancy. Also you should consider the contingencies of sickness and inability to secure employment at all times, as well as the fluctuations in value and demand of his services, and you should make a reasonable deduction for these contingencies. Whatever you may determine to be his actual injury or loss of services, or inability to earn wages, you can in no event award him a greater sum for this element of injury or loss than the present worth of such loss. Understand me, gentlemen, the actual outlay and expense that he has incurred in treating and nursing and medicine should be allowed him, if he is entitled to recover. It is at your discretion to give such an amount as you may think right for mental suffering, and for physical pain and suffering. The actual loss of time while he was sick and unable to work should be awarded to him; but when you come to consider beyond that the disability that he has sustained, which may extend into the future, you are to determine as best you can the extent of that disability, and the injury that he has sustained,—may sustain in the future,—and, when you have determined that as near as you can in your judgments, that amount is not to be, and should not be, the measure of your verdict, but the present worth of it. I suppose you all understand what the present worth of a given sum means. It is arrived at by dividing a given sum by one dollar, plus the legal rate of interest, or usual rate of interest, for the given time."

Under this charge, we do not think the jury were misled so that they gave plaintiff what he had lost by his inability to labor between the time of his injury and the trial, and then figured the same time in their calculation as to his future loss.

It is also contended that the method of obtaining the present worth of a sum of money falling due each year for a given number of years was not sufficiently explained. No fault is found with what the court said, as far as the charge went. Nor was any other instruction on this subject suggested or requested. If the defendants desired

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fuller instructions, it was their duty to have asked them. Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases. The testimony shows that, previous to the accident, the plaintiff was a boiler-maker, earning from $3.25 to $3.50 per day. His hand was disabled, so that he can work at his trade no longer. He has worked at peddling newspapers, and anything he could get, since, and had earned about $300 in a year and a half. Being 29 years of age at the time of the accident, with an expectancy of life of at least 35 years, it requires but little calculation to show that the verdict is a reasonable one, and that the defendants cannot complain that it is excessive.

The judgment is affirmed, with costs.

The other Justices concurred.

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THE IONIA COUNTY SAVINGS BANK AND THE GRAND RAPIDS NATIONAL BANK v. JANE McLEAN ET AL.

Fraudulent conveyances—Assignment of insurance policy—Parent and child—Claim for services.

1. An assignment by an insolvent debtor of a life insurance policy payable to himself, his executors, administrators, or assigns with intent to avoid the payment of his debts, is void as to creditors.
2. The question whether a transfer of property is void as to creditors cannot be affected by the fact that at the time the

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debts were incurred the creditors did not know that the debtor owned the specific property transferred.

3. How. Stat. § 4238, which protects the money payable on a life insurance policy taken out by a husband or father for the benefit of his wife or children from the claims of his creditors, does not cover the assignment to them of a policy payable to himself, his executors, administrators, or assigns.

4. A daughter lived with her father as a member of his family for some eleven years after attaining her majority, but without any contract for hire, and with no other relation than that of father and daughter, and a member of the family, he promising to do something for her, and making a liberal provision for her in his will. And it is held that she had no valid contract which she could enforce either against him or his estate.

Appeal from Kent. (Grove, J.) Argued January 15, 1891. Decided February 27, 1891.

Bill to set aside a deed and the assignment of an insurance policy as fraudulent as to creditors. Complainants appeal from a decree setting aside the deed, but sustaining the assignment. Decree reversed, and one entered in this Court granting the full relief prayed. The facts are stated in the opinion.

Butterfield & Keeney, for complainants.

Taggart, Wolcott & Ganson and *Milton M. Perry,* for defendants McLean.

Frank A. Rodgers, for defendant Young.

GRANT, J. One Alexander McLean died July 14, 1887. He was the husband of the defendant Jane McLean, and father of the defendants Jennie and Leander McLean. On July 1, 1887, he executed a deed to his wife, conveying to her 90 acres of land. On May 4, he assigned to the defendants Jennie and Jane McLean a policy of insurance upon his life for the sum of $5,000. The bill in this case is filed to set aside this deed and the transfer

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of the insurance policy as a fraud upon the creditors of Alexander McLean. By the decree of the court below the deed was set aside as fraudulent, and the transfer of the insurance policy was sustained as valid. Complainants alone appeal.

Said McLean, at the time of his death, was indebted to complainants upon two promissory notes,—one for $4,000, dated April 13, 1887; the other for $4,700, dated April 22, 1887,—executed by himself, and payable to the order of one J. S. Dougall. No money consideration was paid for either the deed or the policy of insurance, except one dollar, expressed in the assignment of the policy. The policy was issued in 1871, and by its terms was payable—

"To the said Alexander McLean, his executors, administrators, or assigns, in sixty days after due notice and satisfactory proof of death."

The annual premium was $148.25, which he had regularly paid, less the dividends; the last payment having been made April 7, 1887. These premiums were usually paid upon receipts sent by the company to the Lowell National Bank, which discounted the above notes, and afterwards transferred them to the complainants. Upon the consent of the executors the insurance company paid the amount of the policy to the defendants Jane and Jennie McLean. Complainants' claims were allowed against the estate in the amount of $9,255.05. Complainants made a written request to the executrix and executor to contest these transfers, and tendered a proper indemnity bond. They refused to institute such proceedings, and thereupon complainants commenced this suit. At the time these transfers were made, Alexander McLean was in failing health, and insolvent, and his estate is also insolvent.

In the absence of a valuable consideration aside from

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love and affection, it is conceded that the transfer of this insurance policy is void as to creditors, unless it is protected by How. Stat. § 4238, which reads as follows:

"It shall be lawful for any husband to insure his life for the benefit of his wife, and for any father to insure his life for the benefit of his children, or of any one or more of them; and in case that any money shall become payable under the insurance the same shall be payable to the person or persons for whose benefit the insurance was procured, his, her, or their representatives or assigns, for his, her, or their own use and benefit, free from all claims of the representatives of such husband or father, or of any of his creditors."

It is manifest from the testimony of Jennie and Leander McLean that these transfers were not thought or spoken of until their father had executed these notes, which, according to their testimony, he did in order to save his worthless and criminal son-in-law, Dougall, from State prison. Jennie testified that the matter was earnestly discussed by the family; that they looked upon these debts as fraudulent, and they thought something could be done to help them. The obvious intent of the transfers was to avoid the payment of these notes, which constituted the great bulk of his indebtedness, and save the property for his wife and daughter. It needs no argument to show that transfers of property under such circumstances are, as to creditors, fraudulent in law and void.

This policy was property, a chose in action, and up to the time of its assignment it was the property of Alexander McLean just as certainly and effectually as a promissory note payable 10 years from date, or upon the happening of a certain event, was his property. Creditors had a right to rely upon that as one of his assets. For 16 years he had done nothing to indicate that this policy was for the sole benefit of his wife and daughter, any

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more than the accumulation of other property was for their benefit. The law of this State exempts certain property for the benefit of the family. Beyond this, all of a man's property, when he is living, and of his estate, when dead, belongs first to his creditors, and must be applied to the payment of his debts. It is the inflexible duty of the courts to see that his property is thus appropriated. The question involved is one purely of law, not of sentiment. Because in the present case the application of the firmly established rule may result in taking from the heirs all the property of the estate, not exempt by law, for the benefit of creditors, this affords no excuse for not applying the rule. In the next case, there may be poor creditors to suffer, and rich heirs attempting to retain the property. In either case the law is the same, and must be inflexibly applied. These remarks are prompted by the strong and able appeal in the brief of counsel for the defendants, on account of their pecuniary condition.

A life insurance policy being property, it follows that its assignment must be governed by the same rule as that of other property. The assignment of a policy is not within the statute. Alexander McLean did not insure his life for the sole benefit of his wife and daughter. He insured it for the benefit of his estate, in which his creditors were to be interested. The argument is not sound that, because he could insure his life under this statute for the benefit of his wife and daughter, therefore he can assign a policy which was not taken out for their sole benefit, and thus place it beyond the reach of creditors. The distinction between the two is obvious. He might have transferred this, like any other property, to his wife or children without consideration, when solvent; but when, being insolvent, he transferred it without a

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valuable consideration, it was subject to the payment of his debts, and the assignment was void.

If the defendants are correct in their contention, a holder of an endowment policy for $50,000 might, a few days before it becomes due, assign it to his wife or children, to the exclusion of his creditors. Such a transfer cannot, in my judgment, be sustained upon either legal or equitable principles. The law recognizes no distinction in the transfer of a debtor's property. Whatever is his, subject to his control, is his property for all intents and purposes; and, in the absence of statutory provision, all transfers made by him must be governed by the same rule.

It is of no consequence that Alexander McLean might at any time during his life have surrendered this policy, for its cash value or otherwise, or that he might have converted any of his property into cash, and taken out insurance directly for the benefit of his wife and daughter. The statute gave him that right. But this question must be determined by what he did do, not by what he might have done.

The defendants introduced evidence tending to show that the notes held by complainants were given by Alexander McLean in renewal of other notes, to which Dougall, his son-in-law, had signed McLean's name without authority. Considerable testimony upon this point was introduced upon both sides. It is unnecessary to determine the question, as it is entirely immaterial to the issue. The notes were allowed as valid claims against the estate, and defendants do not claim to here contest their validity; but they claim from this testimony that complainants did not take these notes in reliance upon this policy as an asset of Mr. McLean. It is wholly immaterial whether or not they knew of this policy at

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that time. The sole question here is whether the transfer of this property was void as to creditors. This question cannot be affected by the fact that at the time the debts were incurred the creditors did not know that the debtor owned the specific property assigned.

The original answer was based upon the sole defense that the assignment was covered by the statute. After the testimony was closed, the court permitted an amendment, to the effect that, as to the defendant Jennie McLean, the assignment was for a valuable consideration. This consideration was based upon services which she had rendered as a member of the family. She lived there without any contract for hire, and with no other relation than that of father and daughter, and a member of the family. She testifies that her father promised to do something for her, and in his will made a liberal provision for her. She had no valid contract which she could enforce either against him or his estate, nor is there any evidence to show that he assigned this policy for any such consideration.

The decree of the court below must be reversed, and decree entered here for the complainants, with the costs of both courts.

The other Justices concurred.

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THE ALDINE MANUFACTURING COMPANY (A CORPORATION) v. BERTRAM W. BARNARD.

Sale—Warranty—Rescission — Fixtures — Conversion — Waiver of tort—Assumpsit.

1. It is now well settled in this State that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties. *Crippen v. Morrison*, 13 Mich. 23; *Robertson v. Corsett*, 39 Id. 777; *Wheeler v. Bedell*, 40 Id. 693; *Ferris v. Quimby*, 41 Id. 202; *Manwaring v. Jenison*, 61 Id. 117; *Stevens v. Rose*, 69 Id. 259.

2. In a suit to recover for a bill of goods sold to the defendant, he resisted payment for a portion of the goods on the ground that they were purchased under a specific warranty, which they failed to fill, and claimed damages by way of recoupment. Plaintiff conceded that the remainder of the goods had been paid for, or a tender made of the balance due therefor, and that if the goods were sold under a warranty, as claimed by the defendant, he was entitled to a judgment of no cause of action. The case was tried upon this issue, the court holding that the defendant's tender precluded him from recovering any judgment under his notice of recoupment; and defendant recovered a judgment of no cause of action. And it is held that the suit was not a bar to an action by the plaintiff to recover the value of the goods covered by the warranty on the refusal of the defendant to surrender possession of the same.

3. On the refusal of a purchaser, who has rescinded a contract for the sale of personal property, to deliver the property to the vendor, he may waive the tort and sue in *assumpsit* for its value (*Tuttle v. Campbell*, 74 Mich. 652); which action can be maintained on the common counts (*McLaughlin v. Salley*, 46 Id. 219), even though the declaration does not set forth such waiver (*McDonald v. McDonald*, 67 Id. 122).

Error to Kent. (Grove, J.) Argued January 16, 1891. Decided February 27, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

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M. H. Walker, for appellant.

More & Wilson, for plaintiff.

LONG, J. This cause was tried in the Kent circuit court without a jury, and the court found the following facts and conclusions of law:

"1. On the 21st day of October, A. D. 1887, plaintiff sold to defendant a bill of Aldine grates, mantels, and hearths, to be placed in a block of tenement-houses owned by defendant in the city of Grand Rapids. This bill of goods includes three No. 18 grates. No time was given or asked on said bill, and on November 1, 1887, defendant paid one hundred dollars by check generally upon said bill, and it was so applied.

"2. In February, 1889, plaintiff brought suit in *assumpsit* against defendant in justice's court, to recover the balance due on the bill, and declared on the common counts only, filing the following bill of particulars as its only claim:

"GRAND RAPIDS, MICH., February 27, 1889.

"BERTRAM W. BARNARD,

"In account with Aldine Manufacturing Company.

1887.			
Oct. 21.	To 8 No. 18 Aldine fire-places.....		
	To 1 No. 22 Aldine fire-place.....		
	To 4 mantels.....	$200	00
	To 4 tile hearths.....		
	To 11 hours springing arches.....	5	00
	To sand 25c; cement $1 00.....	1	25
	To ½ barrel calc. plaster.....	1	10
	To fire clay.....		20
	To four hours tearing out Bissel grate from house.....	2	00
	To mason and tender setting No. 22 grate in house.....	4	00
		$214	05
1887.			
Nov. 1.	By cash.....	100	00
		$114	05
	To 1 yr. 4 months inst. at 6 p. c....	9	12
	Balance.....	$123	17

"This suit resulted in a judgment of no cause of action, and an appeal was taken from such judgment to the circuit court for the

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county of Kent. Said cause came on for trial on the 8th day of June, 1889, before me and a jury. On the trial of said cause defendant testified he had paid in full for said bill of goods, except said 3 No. 18 grates. It was admitted by plaintiff that if the jury should find that on the sale of said grates plaintiff warranted them, as claimed by defendant in his testimony, plaintiff could not recover for said 3 No. 18 grates. Plaintiff then and there admitted that said grates would not fulfill the warranty as claimed by the defendant, and, upon said admission being made by plaintiff, the court ruled that the evidence should be confined to the question of whether the warranty testified to by defendant was in fact made, and the defendant, having tendered $18.02 as the amount admitted to be due, could not recover any judgment for damages against plaintiff under his plea of recoupment. Defendant thereafter testified that before the commencement of suit he had ordered plaintiff to remove said grates, for the reason that they were worthless, and would not work, and that defendant would not pay for them, to which plaintiff's manager and secretary replied that he would not do it; the grates were all right; and that defendant would have to pay for them. Said cause was tried and submitted to the jury on the theory that, if the warranty which defendant claimed was made when the grates were sold was in fact made, plaintiff could not recover, and that defendant could not recover damages on account of breach of said warranty, for the reason that his tender of the amount admitted to be due plaintiff would prevent such recovery. The court charged the jury as follows:

"'*Gentlemen of the Jury:* There is but a single question of fact for you to determine in order to dispose of this case. The sale of the goods and delivery and the price are undisputed. The defendant claims that the sale was accompanied by an express warranty that the grates would do the work of heating the rooms; that one grate would do the work of heating one suite of rooms. The plaintiff claims that no such warranty was given, but, upon the contrary, he stated, as he claims, to the defendant, at the time the selection of the grates was made, that he ought to take the larger size, as they would give better satisfaction. You have heard the testimony. Now, one of these claims is true, and the other is not. It was conceded on the trial that, if you should find that the warranty which the defendant claims was made was in fact made, the plaintiff has no right of action. Therefore all there is of the case, gentlemen, is for you to determine whether or not that warranty which the defendant relies on was made or not,—the warranty that the grates would do the work of heating the rooms. If you find that the warranty was made, as claimed by the defendant, your verdict will be "No cause of action;" if you find that it was not made, your verdict will be for the plaintiff for the amount of his claim, so far as it is proved by the evidence. I think there is no claim but that it is proved, with the exception of the $2.30; and I suppose you would concede, Mr. Walker, the plaintiff is entitled to recover $104.56?

"'*Mr. Walker.* I don't dispute the amount.

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"'*The Court.* Then if you find for the plaintiff your verdict will be for the plaintiff, and you are to assess his damages at $104.56. If you find for the defendant your verdict will be, "No cause of action."

"'*Mr. Walker.* You have used the term "warranty" all through. I would like to have it stated what the defendant testifies to constitutes a warranty.

"'*The Court.* If you find that the agent, Mr. Phillips, assured the defendant, stated to him, that one of these grates would do the work of heating one of these suites of rooms, that would constitute a warranty. Swear an officer.'

"Under the instruction of the court said jury rendered a verdict of no cause of action, and judgment was entered accordingly, which judgment has never been appealed from or vacated.

"8. After the termination of said suit plaintiff, by its manager, James T. Phillips, demanded from defendant said three grates. Defendant said in reply that he would refer the matter to Myron H. Walker, his attorney; and soon after plaintiff received a letter from said Walker, refusing, on behalf of defendant, to allow plaintiff to remove said grates, which letter is as follows:

"'GRAND RAPIDS, MICH., 6-21, 1889.

"'THE ALDINE M'F'G CO.,

"'City,—

"'*Gent'n*: Regarding your request for leave to take out and take away the Aldine grates in Mr. Barnard's house, I have to say that I find no authority of law or foundation of right for such action. These grates were solid unconditionally, on what the jury has determined was a false warranty, and by your own act were solidly built into the chimneys of Mr. Barnard's house, and have thereby become fixed parts of the house and the real estate, and could not be removed without great damage to the house. I fail, under these circumstances, to see what right you acquire to remove them simply because your warranty has been proved and found to be false, and Mr Barnard's damages to be at least as great as the balance claimed on your account, so that you were found to have already received your full pay. I cannot comply with your request, and, furthermore, I notify you that you will be held strictly accountable for all damages occasioned by any attempt to remove them.

"'Very resp'y, M. H. WALKER.'

"Afterwards, and on the 25th day of June, 1889, said Phillips, on behalf of plaintiff, made demand upon defendant in the following language:

"'You have in your block of houses on the corner of Court and Allen streets in the city of Grand Rapids, Michigan, three No. 18 Aldine fire-places or grates. The Aldine Manufacturing Co., of said city of Grand Rapids, is the owner of said three grates, and entitled to the possession thereof. In behalf of said company I hereby demand said grates, and that said company be allowed to remove said grates from said houses. On the part of said company I undertake, if this demand be granted by you, to remove said grates in a reasonable and careful manner, and at such time as shall best suit the convenience of yourself and the occupants of

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said houses, and to remove said grates without injury to the mantels or hearths or any other property of yourself or tenants.'

"Said demand was in writing, but unsigned, and was read to, but not left with, said defendant. Defendant refused to grant this demand, and refused to allow plaintiff to remove said grates. I further find that prior to the commencement of this suit defendant had converted said three grates, the property of said plaintiff, to his own use.

"4. Afterwards this suit was commenced in *assumpsit* by plaintiff before Thomas Walsh, justice of the peace, for the value of the grates. Judgment was rendered for plaintiff for one hundred dollars damages, and defendant appealed.

"5. I find that said three grates were worth at the time demand was made as aforesaid the sum of eighty-five dollars, and that interest on said sum to date amounts to $2.50.

"6. I further find that the whole bill of parcels, to wit, 1 No. 22 Aldine fire-place, 3 No. 18 Aldine fire-places, 4 tile hearths, and 4 mantels, mentioned in plaintiff's bill of particulars in said first suit, were all included and sold by the terms of the original contract of sale for the single price of $200 for the whole lot, which also included the setting of the same in defendant's block, and that said setting was in fact done by plaintiff and its agents at its own expense. I further find that said grates are so placed that they can be removed without material injury to defendant's property, and that when said grates were placed in defendant's house they did not become fixtures or a part of the real estate.

"CONCLUSIONS OF LAW.

"1. At the termination of the first suit brought by plaintiff against defendant, resulting in a judgment of no cause of action, the title to said three Aldine grates was in plaintiff, and plaintiff was entitled to possession of the same.

"2. After demand and refusal to deliver up the grates, plaintiff was entitled to maintain this action against defendant for the value of said grates. Plaintiff is therefore entitled to judgment for eighty-seven and 50-100 dollars, the value of the grates at the time the demand was made, with interest and cost of suit."

Judgment was entered accordingly. Exceptions were alleged to these findings of fact and conclusions of law. It is insisted here—

1. That upon the facts found the grates became fixtures.

2. That the evidence does not sustain the finding that the grates did not become fixtures.

3. That the former suit is a bar to this action.

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4. That under the circumstances stated upon this record plaintiff could not waive the tort and maintain an action of *assumpsit*.

From a careful examination of the record we are all agreed that the evidence supports the finding that the grates did not become fixtures, and the court properly so found. The grates were sold, with other goods, as one parcel, and at an agreed price; but the grates were warranted to heat the rooms for which they were intended. The defendant paid for all the goods except the grates, and refused to pay for them because they did not fulfill the warranty. After receiving the goods he paid $100, and, when payment was demanded, he tendered to the plaintiff $18.02, balance unpaid on the goods except the grates, for which he refused to pay, and ordered the plaintiff to remove them. At this time he made no question but that the grates could properly be removed, and desired the plaintiff to do so, and made no claim that they were fixtures. The plaintiff denied that any such warranty was made, and therefore refused to take the grates. It is quite remarkable that during the whole controversy arising out of the first suit neither the defendant nor his counsel made any claim that the grates could not be removed without injury to the building, but, on the contrary, the defendant was demanding that they should be removed by the plaintiff. The question was never raised until after the termination of that suit, and even when demand was thereafter made the defendant made no such claim, but in reply to the demand stated that he would refer the matter to his attorney. It was then discovered by his attorney for the first time in the history of the case that the grates had become fixtures, and for that, among other reasons, the plaintiff could not have satisfaction for the property which defendant had of the plaintiff, and for which not one dollar had

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been paid. Taking these facts into consideration, as well as the manner in which the grates had been put in, it is quite evident that the defendant never intended to retain them until he was advised by his counsel that plaintiff could not, as a matter of law, take them out without injury to the freehold, and that plaintiff was barred from taking them by the result of the former suit.

It is true that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract; that neither the mode of annexation nor the manner of use is in all cases conclusive; yet these considerations are frequently of much importance in arriving at the intention of the parties, which is the real test. It is now well settled in this State that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties. *Crippen v. Morrison,* 13 Mich. 23; *Robertson v. Corsett,* 39 Id. 777; *Wheeler v. Bedell,* 40 Id. 693; *Ferris v. Quimby,* 41 Id. 202; *Manwaring v. Jenison,* 61 Id. 117; *Stevens v. Rose,* 69 Id. 259. Under the finding of the jury in the first proceeding the grates were sold under an express warranty. It was conceded on that trial that they did not fulfill it, and the defendant testified that he ordered the plaintiff to take them out, which was not denied. It is therefore a legitimate conclusion, and the only sensible conclusion which can be arrived at under these circumstances, that the sale was a conditional one, dependent upon the fact whether the grates would heat the rooms, which it is conceded they would not do. Thus it clearly appears that the parties did not intend to make them fixtures, and this, coupled with the manner of their being affixed, must settle, and did settle in the mind of the trial court, the fact that they were not fixtures. We see no error in this finding.

The court below was equally right upon the question

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of the former suit not being a bar. The former suit was in *assumpsit* for the value of the goods sold, the bill of particulars of which is set out in the findings of the trial court. On that trial the defendant testified that he had paid in full for all the goods except the grates. The controversy was thus narrowed to the right of recovery for those. It was claimed on the part of the defendant that they were purchased under a warranty that they would heat the rooms. This the plaintiff denied, but admitted they did not fulfill the warranty if one was made. Upon this admission the court ruled that the evidence should be confined to the question whether the warranty testified to by defendant was in fact made, and that the defendant, having tendered $18.02 as the amount admitted to be due, could not recover any judgment for damages against plaintiff under his plea of recoupment. The cause was submitted to the jury upon the one question of whether a warranty was in fact made, and by their verdict they found it was made, and gave judgment of no cause of action.

Defendant's counsel now insists that this action and the proceedings taken were in affirmance of the contract, and therefore all the questions were there settled which are now sought to be raised in the present suit. It appears, however, that on that trial the defendant testified that he not only tendered the amount claimed for the balance of the bill aside from the grates, but had made a demand upon the plaintiff to remove the grates. Defendant then gave no evidence, and, so far as this record shows, offered none to show the amount of his damages, if any had been sustained; and he appears to have taken no exception to the ruling of the court that he could not recover judgment against the plaintiff on account of having made the tender. It is evident from the record presented here that in the controversy in the

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former suit the whole case was treated as a rescission of sale. The plaintiff's admission is evidence that it so viewed the case, and the court, from the rulings made on the trial, apparently regarded the case as one of rescission. There is no other theory upon which the defendant had a right to defeat the plaintiff's claim under the admissions made and the ruling of the trial court. If the defendant claimed upon that trial that he had a right to keep the grates and recover his damages, then it must be presumed the trial court would not have submitted the case to the jury without some proof of damages; but none was made, and the trial court adjudged it not necessary to the case as presented. Upon what theory could it be said that the damages, none having been proved, amounted to exactly the value of the grates? And yet, if the theory of defendant's counsel is adopted here, we are to hold that the trial court and the attorneys of the parties so regarded it, and that the plaintiff's admission upon that trial amounted to a concession that such was the fact. We cannot agree to such a proposition. The admission of the plaintiff cannot be so enlarged, and if it were so intended it would be a reflection upon the judgment and intelligence of the court and counsel trying that case. If the case was tried upon the theory that the defendant had the right to rescind by reason of the breach of the warranty, and had tendered the grates back to the plaintiff for that reason, then the whole course of the trial and the ruling of the trial court in this case are easily explainable. We are satisfied that this was the theory upon which the cause was tried. That cause was not, therefore, a bar to the present action, as the title to the grates had never passed to the defendant, and did not pass by reason of any action taken by the plaintiff upon the trial.

It is also contended that the plaintiff had no right to

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waive the tort and sue in *assumpsit*. There is nothing in this point. It was personal property in the hands of the defendant, to which the plaintiff was lawfully entitled. He demanded it, and defendant refused to surrender the possession. The action was commenced in trover, and by stipulation of the parties the form of the action was changed to *assumpsit*. The possession of the property was obtained under contract between the parties, and the refusal to surrender upon demand amounted to a conversion for which the tort could be waived and *assumpsit* brought. *Tuttle v. Campbell*, 74 Mich. 652. The action could be maintained on the common counts (*McLaughlin v. Salley*, 46 Mich. 219), even though the declaration does not set forth the waiver of the tort (*McDonald v. McDonald*, 67 Mich. 122). We find no error in the record.

The judgment must be affirmed, with costs.

The other Justices concurred.

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WALLACE A. PRESTON AND FREDERICK COLLINS v. HENRY M. ZEKIND.

Statute of frauds—Promise to pay debt of another—Estoppel.

In this case it is held that if defendant impliedly promised to pay plaintiffs for materials furnished to third parties, who had contracted to build defendant a house, by asking plaintiffs to wait for their pay until a certain date, there is nothing on the record to take such promise out of the statute of frauds, by estoppel or otherwise.

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Error to Berrien. (O'Hara, J.) Argued January 16, 1891. Decided February 27, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Lawrence C. Fyfe, for appellant.

N. A. Hamilton, for plaintiffs.

MORSE, J. This is a suit in *assumpsit* upon the common counts to recover the sum of $1,245.55, with interest from December 12, 1888. The plaintiffs' claim is that this sum is the balance due them upon materials furnished and used in the building of a house owned by defendant. The house was built for defendant by two carpenters, Kupperness and Johnson. The defendant claims that these carpenters contracted to build his house and furnish the materials at the stated sum of $3,400, and they are the persons liable to plaintiffs for the materials furnished.

It does not appear that defendant ever made any contract with plaintiffs for any part of these materials. The full bill of plaintiffs was $1,845.55, upon which Kupperness and Johnson paid $600. The materials were ordered of plaintiffs by Kupperness and Johnson. Plaintiffs charged them on their books to the account of "H. M. Zekind House. Kupperness-Johnson,"—supposing they would have a lien upon the house under the lien law, since declared unconstitutional by this Court. The claim of the plaintiffs to recover from defendant seems to be based wholly upon conversations with the defendant after part of the materials had been furnished. Mr. Collins, one of the plaintiffs, testifies that just before October, 1888, after most of the materials had been furnished, Mr. Zekind came down and asked him if plaintiffs would wait upon him for their bill until January 1, 1889. Collins

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replied that they would. The bill was due December 12, 1888. Collins saw Zekind again a day or two after January 17, on which day plaintiffs had rendered him a bill of the goods furnished. Zekind came to the office of plaintiffs, and asked if they would take a mortgage on the house of Kupperness or Johnson for the amount of the bill, and Collins told him he would not. He then asked if they would take such mortgage provided he got it discounted. Collins replied that they would. Zekind said nothing leading them to believe that he in any way denied his liability for the bill. In March, Zekind told them that he meant to repudiate the bill, and they brought suit. Plaintiffs testified that they granted the credit on the strength of the lien law. They do not claim that Zekind, in so many words, promised to pay them for these materials, but impliedly did so by asking them to wait upon him until about the 1st of January.

Mr. Zekind denies that he ever promised to pay them for the materials. He says that, when he called upon them about October 1, he asked them "how the boys were paying up," and they showed by the books that $600 had been paid, and there was a balance unpaid of about $350. He then asked them if they could not wait upon Kupperness and Johnson until January 1, because it was going to press him some to pay Kupperness and Johnson, and plaintiffs said they would wait with pleasure. Kupperness testified that about this time he asked defendant for some money; and, the balance due being more than Zekind expected, Zekind said he would go down and see plaintiffs and get them to wait on him. Zekind says that he told Kupperness that he would get them to wait upon Kupperness and Johnson.

A large portion of the record is devoted to testimony, received under objection, relating to the cost of the house as built, the plan of the same, amount of extra

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work done, etc., which was entirely immaterial to the issue. Such testimony would have been relevant in a suit between Kupperness and Johnson and Zekind, perhaps, upon their contract to build the house, but it had no place in this case. It is evident from all the testimony that Kupperness and Johnson contracted to build the house and furnish all the materials, and it makes no difference whether they agreed to do this for $3,400, or, as they claim, Mr. Zekind told them to go ahead and build the house, and he would do what was right. In either case there is not a *scintilla* of evidence tending to show that it was intended that he should purchase any of the materials, or that he made them his agents for such purpose. While he may be liable to them for the whole cost of the building, he could not be made liable to others for their purchases. The court was therefore radically wrong in admitting the testimony as to the cost of the house, etc., referred to above, and in submitting to the jury the proposition that, if they found Kupperness and Johnson to be the agents of the defendant in purchasing these materials of plaintiffs, the defendant should be held liable for this balance. The debt, in the first place, to plaintiffs, was undeniably, from this record, the debt of Kupperness and Johnson.

Nor do we think that defendant, by asking plaintiffs to wait upon him until January 1, 1889, could be made liable for this debt of another. Plaintiffs do not even claim that he ever expressly promised, even orally, to pay this balance, but, by requesting them to wait upon him until January 1, he impliedly promised to pay them. A large portion of this balance was furnished after he asked them to wait upon him, and there is nothing tending to show that either plaintiffs or defendant had such portion in mind when this request was made. I can find nothing in this implied promise to take it out of the statute

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of frauds. The cases cited by plaintiffs' counsel, to wit: *Heyn v. O'Hagen*, 60 Mich. 150; *Loranger v. Foley*, 79 Id. 244; *Hagadorn v. Lumber Co.*, 81 Id. 56,—do not apply. There was no agency here to ratify, as in the first case above cited; nor was the debt originally the debt of the defendant, as in the other cases. Defendant asked the plaintiffs, according to their theory, to wait upon him until January 1, in October, for the payment of lumber, etc., ordered by and furnished to Kupperness and Johnson, and charged to "H. M. Zekind House. Kupperness-Johnson" upon their books. They had never given any credit to him, but relied upon payment by Kupperness and Johnson and a supposed lien upon the house. Before this request they had never thought of looking to defendant for payment, but relied principally upon the lien law of 1887, which has since been declared to be no law. *Spry Lumber Co. v. Trust Co.*, 77 Mich. 199.

The question of an estoppel is raised against the defendant, but we find nothing in the record to justify it. The plaintiffs do not show that they released Kupperness and Johnson from their liability, or lost any right against them on account of the conversation with defendant. They claim they did not proceed against the house under the lien law, however, because of such alleged implied promise on his part to pay them. When they talked with defendant it is not shown that they had taken any steps under any lien law, or that defendant ever had any reason to believe that they intended to do so. Indeed, the record and the argument of plaintiffs' counsel give the inference that proceedings under the lien law were not taken because it was supposed they had no lien that they could enforce, under the decision of this Court in the Spry case. But, even if, as one of the plaintiffs testifies, they did not proceed under the lien

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law against the building because of the supposed promise of the defendant to pay them, the talk of defendant with them, upon which they ground such promise, was not sufficient in law so that they could rely upon it and build an estoppel. We do not think that the law of estoppel can be invoked, in such a case as this, to, in effect, take this promise (if there was any promise) to pay another's debt out of the statute of frauds. The circuit judge should have directed a verdict for the defendant at the close of the plaintiffs' testimony, as requested by the defendant's counsel.

The judgment will be reversed, with costs of both courts, and a new trial granted.

The other Justices concurred.

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NELLIE B. TUBBS v. DWELLING-HOUSE INSURANCE COMPANY.

Fire insurance—Application—Mistake in representations—Knowledge of agent—Proofs of loss—Practice in circuit court—Taking documents to jury-room—Judgment—Error without prejudice.

1. Where an agent whose authority is confined to soliciting applications for insurance, which provide that the company shall not be bound by any act done or statement made by or to any agent or other person not contained in the application, is *correctly* informed of the amount unpaid on a land contract under which the applicant holds, and by *mistake* or otherwise inserts a *less* sum in the application, which he fills out, and the applicant without carelessness on his part, and in reliance upon the acts and conduct of the agent in preparing the application, signs it without reading it or having it read to him, and without notice or knowledge of such misrepresentation, which

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application is not attached to the policy, the company cannot avoid liability under a provision of the policy that by its acceptance the assured covenants that the application shall form a part of the policy, and a warranty by the assured. *Crouse v. Insurance Co.*, 79 Mich. 249.[1]

2. Failure to make proofs of loss within 30 days, as provided for in an insurance policy, will only operate to postpone the right of action of the assured until the proofs are supplied, where there is no limitation in the policy as to the time within which suit must be brought, nor provision for forfeiture in case proofs are not made within the 30 days.

3. Including articles not owned by the assured in his proofs of loss on the supposition that they are covered by the policy, and without fraudulent intent on his part, will not invalidate the policy.

4. Where exhibits have been fully proven and admitted in evidence, and their authenticity is unquestioned, and there is no testimony to impeach their contents, it is within the discretion of the trial court to allow them to be taken to the jury-room, although objection is made.

5. Where the conceded loss under a clause of an insurance policy exceeds the sum insured thereunder to an amount greater than the value of certain articles which the court instructs the jury plaintiff can recover for under said claim, the error, if one is committed, is not prejudicial to the defendant.

6. Where in an insurance case the jury disregarded the instruction of the court limiting the loss recoverable under a certain clause of the policy to a sum less than that covered by the clause, and the jury rendered a verdict for the greater amount, and no application was made to the trial court to correct the error, the judgment will not be reversed, but will be corrected by making the necessary deduction.

Error to Tuscola. (Beach, J.) Argued January 16, 1891. Decided February 27, 1891.

Assumpsit. Defendant brings error. Judgment modified and affirmed. The facts are stated in the opinion.

Hanchett, Stark & Hanchett, for appellant.

[1] See *Russell v. Insurance Co.*, 80 Mich. 407 (head-notes 2, 3); *Cook v. Insurance Co.*, 84 Id. 12; *Gristock v. Insurance Co.*, Id. 161; *Hoose v. Insurance Co.*, Id. 309; *Insurance Co. v. Reed*, Id. 524.

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D. B. Richardson (*C. F. Collier*, of counsel), for plaintiff.

[The points of counsel are so fully stated in the opinion, and the authorities so fully discussed in this case, and in the cases cited by the Court and in the foot-note, that a summary of the briefs of counsel is omitted.—REPORTER.]

MCGRATH, J. This is an action upon a five-year policy of insurance, issued by defendant May 14, 1887,—$100 on plaintiff's frame dwelling-house; $700 on household furniture, beds and bedding, wearing apparel, provisions and stores, piano, organ, and sewing-machine, in said dwelling; $60 on frame ice and milk house; and $50 on dairy furniture, provisions, and stores,—situate on a farm owned by plaintiff. The application sets forth that applicant's interest in the property was under contract with one Lacey, who held the title, and that the property was incumbered with the sum of $2,000 due said Lacey. The application contained the following printed provision:

"I hereby agree that * * * the foregoing shall be deemed and taken to be promissory warranties, running during the entire life of said policy. * * * The company shall not be bound by any act done or statement made by or to any agent or other person which is not contained in this, my application."

The policy refers to the application on file in the office of the company, and provides that the loss is—

"To be paid 60 days after notice and due and satisfactory proof of the same shall have been made by the assured, and received at the company's home office at Boston, Mass., in accordance with the terms and provisions of this policy hereinafter named."

The policy contains the following provision:

"By the acceptance of this policy the assured covenants

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that the application herefor shall be and form a part hereof, and a warranty by the assured, and the company shall not be bound by any act or statement made to or by any agent unless inserted in this contract. * * * Any fraud or attempt to defraud or deceive on the part of the assured, and any misrepresentation in the proofs or examination as to loss or damage, shall forfeit all claims under this policy. * * * All persons having a claim under this policy shall forthwith give written notice of the loss or damage, and within thirty days furnish proofs thereof, signed and verified by the claimants;" and then follows a statement as to what the proofs shall contain.

Fire occurred March 27, 1889, and the company refused to pay the loss, because:

1. The representation made in the application as to the incumbrance upon the property was untrue, in that the amount thereof was $3,000, instead of $2,000, as stated in the application.
2. The proofs of loss were not furnished until May 25, more than 30 days after the loss occurred.
3. The proofs of the loss embraced property that did not belong to the assured, and therefore all claims under the policy were forfeited.

It appeared upon the trial that one Taylor, an agent of the defendant, solicited the insurance, and filled out the application[1]; that plaintiff did not read the application, but signed it when presented by Taylor; that Taylor asked her how the land was owned, and she told him that she had bought it on land contract from one Lacey; that the purchase price was $3,500, and that she had paid $500 down, and kept the interest up. No testimony was offered by the defendant, and plaintiff's testimony is uncontradicted. To the proofs of loss was attached plaintiff's affidavit, which contained the following clauses:

"That the annexed and foregoing schedule of articles is a true list of the articles insured under said policy

[1]Taylor was a soliciting agent, and had no power to issue policies.

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which were burned and totally destroyed by said fire; that the same are a total loss to deponent; that said property insured under said policy, and burned by said fire, as aforesaid, was free and clear from incumbrance, lien, or levy; and that claimant's title thereto is the absolute ownership thereof. * * * * * * *

"That the farm and dwelling-house and ice-house were purchased by assured upon contract, which said contract is held and owned by William Lacey, of Holly, Mich., upon which there still remains unpaid three thousand dollars."

The proofs of loss contained an itemized list of articles lost by the fire, with the present value of each article. It included some of her husband's wearing apparel, and some of the apparel of an adopted son. Plaintiff testified that she was told by Taylor to include in the list all articles burned in the house, and that she supposed that her husband's wearing apparel was covered by the policy.

1. Upon the first question raised by the defendant, the court instructed the jury as follows:

"One fact for you to determine there is, whether the plaintiff, Mrs. Tubbs, correctly informed the agent as to the actual amount of incumbrance, or the amount still due, upon the premises. You will determine that fact. If you find that she did correctly state it, you will determine the fact whether the agent understood it,—whether he inserted the amount in the policy understandingly or not. You will also determine whether it was inserted by mistake. Then I say to you, as a matter of law, that if she correctly informed him as to the amount, and the statement in the application, that the incumbrance was $2,000, was inserted by the agent knowing the true amount, or through mistake, and the application was presented to her to sign, and she was requested to sign it, and didn't read it through, understanding by the acts and conduct of the agent that the application correctly stated the answer which she had made, and she so signed it, and with that impression, derived from the acts and conduct of the agent, then the claim of fraud could not be maintained here, and the policy would not be void on that account. But if she did understand the amount that

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was stated in the application herself, and the agent had misunderstood the statement, didn't understand it, or made a mistake in regard to it, as I say, if she understood the amount which was inserted in the application, the agent not having got the answer correctly, through deafness, or any other reason, and she knew the amount stated in the application to be wrong, and signed the application so knowing, then that would avoid the policy. Now, there is a question of fact for you to determine as to how that amount came in the application, and what the parties knew and understood about it.

"I will say, further, if she had an opportunity to read that application, and neglected to do so of her own motion, of her own will, not misled by the acts or conduct of the agent, or lulled into silence as to what it contained by his acts and conduct, in preparing the application and all the circumstances surrounding the preparing of it; that it was a mere act of carelessness or neglect on her own part,—then, under those circumstances, the policy would be void, and she could not recover in this case."

This question has been frequently before this Court, and there was no error in the instruction given. See *Crouse v. Insurance Co.*, 79 Mich. 249. See, also, *Insurance Co. v. Brodie*, 52 Ark. 11 (11 S. W. Rep. 1016), and cases cited. The only distinction between the case cited and this is that the application here contains a restriction upon the agent's power, which is as follows:

"The company shall not be bound by any act done or statement made by or to any agent or other person which is not contained in this, my application."

But the act done by the agent was a misrepresentation made by the agent in the application itself at the inception of the contract, and the application was not attached to the policy, but was retained by the company.[1] It had never been read by the plaintiff. She therefore had no notice of the misrepresentation, or of the restric-

[1] See *Insurance Co. v. Reed*, 84 Mich. 524, where the application was attached to the policy.

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tion upon the agent's powers. The rule laid down in the cases cited, and supported by the clear weight of authority, is that the knowledge of the agent is the knowledge of the company, and that notice to the agent is notice to the company. Not only was the agent correctly informed as to the amount of the incumbrance, but he knew that the plaintiff had not read the application, and consequently did not know of the limitation upon the agent's powers. The signing of the application by plaintiff is no more conclusive upon plaintiff as to the printed clause limiting the powers of the agent than it is as to the misrepresentation with reference to the incumbrance. It would be manifestly absurd to say that a misrepresentation of a material fact in the application does not invalidate a policy of insurance, where the application is not read to or by the applicant, and the misrepresentation was inserted by an agent of the company without the knowledge of the applicant, and contrary to her instructions, although she signed it, yet that by reason of a printed clause in the application, inserted by the company without the knowledge of the applicant, and to which her attention was not called, the misrepresentation would invalidate the policy, because the application was signed by the assured. As is well said in *Insurance Co. v. Wilkinson*, 13 Wall. 222:

"The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals."

Again, plaintiff did not seek to avoid any requirement of the contract by reason of any assurance or license given her by the agent, nor does she seek to excuse the non-performance of any condition by setting up any matter communicated by her to the agent. She insisted that she gave to the agent the correct amount of the incum-

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brance, and that he (not she) misstated the amount, and the company sets up the act of its own agent to defeat the policy. The question here is not one of the authority or power of the agent, but it is one of his care or good faith in doing an act which the company does not prohibit, and which he usually performs.

It may be urged that the policy contained a like restrictive clause, and that plaintiff is properly chargeable with a knowledge of what is in the policy. This may be true, but the application was not attached to the policy, but was filed away in the office of the company, and was not produced until after the loss; hence plaintiff had no knowledge of the act of the agent complained of until that time. As indicating her entire good faith, in her proofs of loss she sets forth that there *still remains* unpaid upon this incumbrance the sum of $3,000.

2. The second objection is that proofs of loss were not made within the 30 days provided by the policy. There is no limitation in the policy here as to the time within which suit must be brought, nor does it contain any provision that the failure to furnish proofs of loss within the 30 days shall work a forfeiture. The policy simply provides that—

"Until such proofs, plans, specifications, and certificates shall be furnished, and such examination had, * * * the claim shall not be due or payable."

The failure to make the proofs within the 30 days did not operate as a forfeiture, but only postponed the right of action till they were supplied. *Insurance Co. v. Downs*, (Ky.) 13 S. W. Rep. 882.

3. The third objection is that plaintiff, in her proofs of loss, made claim for the loss of property of which she was not the owner. Plaintiff testified that she included some articles in the list that were not her property,

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because Taylor told her to make a list of the articles burned; that she had no intention of defrauding the company, and supposed they were included in the policy covering clothing and wearing apparel. It is well settled that, if no fraud was intended by the assured, the policy will not be invalidated on that ground. 4 Field, Lawy. Briefs, 311, and cases cited. This question of plaintiff's intent was fairly submitted to the jury under proper instructions from the court, and they have found that no misrepresentations were intentionally made.

4. One of the errors assigned is the action of the court in permitting the jury, upon retiring, to take with them the policy, the application, and the proofs of loss, against defendant's objection.[1] It will be remembered that no testimony was offered on the part of the defendant. The papers taken to the jury-room were exhibits fully proven, and concerning the contents of which there was no dispute. To the proofs of loss was attached a list of the articles burned, with the value of each article as sworn to. The jury were instructed by the court to strike from this list and exclude certain articles which belonged to the husband, and, as an aid to them in so doing, they had before them the list. It was held in *Bethel v. Linn*, 63 Mich. 464, that, where the articles in controversy were so numerous that the jury would not be likely to carry them in mind, it was not error to permit a list of the articles to be taken to the jury-room.

The rule laid down in *Millar v. Cuddy*, 43 Mich. 273, namely, that it was not error to permit a computation made by plaintiff's attorney, showing the amount claimed to be due, to be taken to the jury-room, has been modified by subsequent decisions.

1. It has been held to be reversible error to permit the

[1] See *Harroun v. Railway Co.*, 68 Mich. 208.

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defendant's requests to charge which were marked "Given" to be taken to the jury-room. *Hewitt v. Railroad Co.*, 67 Mich. 61, 79.

2. *In re Foster's Will*, 34 Mich. 24, the court refused to allow the will to be taken by the jury, and this Court held there was no error.

3. In *Canning v. Harlan*, 50 Mich. 323, the court refused to allow a receipt to be taken by the jury, and this Court refused to disturb the judgment.

4. In *Bulen v. Granger*, 63 Mich. 331, the court allowed a due-bill to be taken by the jury, and this Court affirmed the judgment, saying, however, that the general rule is against the practice where objection is made, but, inasmuch as the defendant was not prejudiced, they should not interfere.

5. In the case of *Chase v. Perley*, 148 Mass. 289 (19 N. E. Rep. 398), the trial court refused to permit certain receipts to go to the jury-room, and the supreme court held that it was not error, putting it upon the ground that the receipts were not put in evidence.

The true rule seems to be that, where exhibits have been fully proven and admitted in evidence, and their authenticity is unquestioned, and there is no testimony to impeach their contents, it is within the discretion of the trial court to allow them to be taken to the jury-room, although objection is made; and there was no error in permitting the papers here to be taken by the jury.

5. An exception is taken to the charge of the court that the plaintiff could recover for the wearing apparel of the adopted son, who was a member of the family. We cannot see how the defendant was prejudiced by this instruction. The wearing apparel of the boy included in this list was one pair of rubber boots, one woolen shirt, one pair cuff buttons, one pair celluloid cuffs, one collar, one suit of boy's clothes, and one new hat, aggregating in value about $25. These articles, if insured at all, were insured under the $700 clause in the policy, and the loss under this clause was somewhere between $1,000 and $1,100.

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6. It appears by the record that the total amount of the insurance was $910, of which $50 was on dairy furniture, provisions, and stores, etc. The court instructed the jury that the only loss proven under this clause was the sum of $1.37, but the jury disregarded this instruction, and brought in a verdict for the full amount of the policy.[1] This was error, and it was the duty of the court to have corrected it; but it does not appear that either party made any application to the trial court to make such correction, and, not having done so, we do not feel called upon to reverse the case for that reason, but will make the correction here, reducing the judgment of the court below to the sum of $887.14, and affirming the judgment as to that amount, with costs of this Court to defendant.

The other Justices concurred.

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ELLEN E. MONTGOMERY v. CHARLES F. ALLEN.

Evidence—Offers of compromise.

Offers of compromise cannot be considered as an admission of liability.

Error to Wayne. (Gartner, J.) Argued January 16, 1891. Decided February 27, 1891.

Negligence case. Defendant brings error. Reversed.

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[1] The jury were instructed not to add interest to the amount of plaintiff's loss, if they found in her favor, which by consent of counsel was to be computed by the court at six per cent. for five and two-thirds months, and amounted to $25.77, which, added to the $910 insurance covered by the policy, made a total of $935.77, for which sum judgment was rendered.

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The facts necessary to a decision of the case are stated in the opinion.

Brennan & Donnelly, for appellant.

W. W. Chapin, for plaintiff.

GRANT, J. This is an action to recover damages for the alleged negligence of the defendant in driving his carriage into and against the carriage in which plaintiff and another were riding.

Plaintiff, upon cross-examination, testified that one Dr. Dakin attended her and prescribed for her. On redirect examination she testified, without objection, that Dr. Dakin told her he was sent by Mrs. Allen, the wife of defendant, to settle with her; and that he made an offer of compromise. Dr. Dakin was called as a witness for defendant, and testified that he told plaintiff that he had advised Mrs. Allen to settle the matter up. Counsel for defendant then moved to strike out all the evidence in regard to this compromise. The circuit court denied the motion. In its charge to the jury the court said:

"There was some testimony in regard to an offer of compromise. As far as that question is concerned, as to Dr. Dakin being authorized by the defendant to make an offer, that cannot form the basis of an action. Of course, you have a right to consider that with all the other testimony in the case."

This evidence was wholly incompetent. Offers of compromise cannot be considered as an admission of liability. The court should have excluded this testimony from the consideration of the jury.

For this error judgment must be reversed, and a new trial ordered, with the costs of this Court.

The other Justices concurred.

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James W. Robinson v. The Detroit, Lansing & Northern Railroad Company.

Contract—Settlement.

This case involves the question of the effect of the acceptance by the plaintiff of a check for the amount claimed by the defendant to be due him for ties furnished the defendant as per a statement accompanying the check, and which plaintiff receipted, but on the same day sent defendant a protest against the inspection upon which the account was based. And it is held that the whole question as to whether it was a conclusive and binding settlement was properly left to the jury, and the judgment in favor of the defendant is affirmed.

Error to Montcalm. (Smith, J.) Argued February 6, 1891. Decided February 27, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George S. Steere, for appellant.

McGarry & Ford (*C. B. Lothrop,* of counsel), for defendant.

Champlin, C. J. This is an action upon the common counts in *assumpsit,* commenced by declaration, to recover from the defendant the value of certain ties sold and delivered to it by the plaintiff. The plea was the general issue.

In 1886 the plaintiff sold and delivered to the defendant a quantity of railroad ties, under a written contract entered into on June 1, 1886, in which the plaintiff agreed to deliver to the defendant on or before July 1, 1886, 800 ties, according to the following specifications, namely:

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"Ties to be made from white oak, burr oak, and hemlock; to be cut from sound, live timber, eight feet long, six inches thick, to an even and parallel thickness, neatly and carefully hewn with the broad-axe, and ends sawed square; to be delivered upon the right of way of the company at or above grade, at a distance of not less than eight feet from the nearest rail, in cross-piles, with ties six inches apart, and owner's name plainly marked on each pile. Each pile must be entirely separate, so as to allow inspection on all sides; all piles to have at least two feet interval from other piles or fences."

"The following specifications, with the above, will govern inspection: No. 1, hewed or slabbed oak ties, cut two from a log, commonly known as 'string ties,' nine inches or upwards face on both sides, with bark all removed,—a first-class tie in every respect; No. 2, hewed or slabbed oak ties, similar to the above in every respect, seven to nine inches face; No. 3, sawed oak ties, seven inches face, squared up; No. 4, hewed or slabbed hemlock ties, one from a log, nine inches or upwards face on both sides,"—for which the railroad company agreed to pay Robinson as follows: "No. 1 oak ties, 40 cents each; No. 2 oak ties, 40 cents each; No. 3 oak ties, 35 cents each; No. 4 hemlock ties, —— cents each; ties to be inspected and paid for monthly, less 10 per cent., which will be retained on all payments until the completion of the contract, which 10 per cent. will be forfeited in case of failure to complete the contract."

This contract was filled by Robinson, and the ties paid for by the company.

In the year 1887, the plaintiff claims that he entered into another contract with the defendant, through its timber agent, a Mr. Wiley, for putting in 5,000 ties, under the same specifications as of those which were furnished in 1886, and, in addition to those, the plaintiff claims that he made a verbal contract with Mr. Wiley to take all the ties he could put in until November 1, 1887. The plaintiff claims that under his contract made with the defendant through Mr. Wiley in 1886 he delivered red-oak ties, which were accepted by Mr. Wiley as No. 1 ties, and paid for accordingly, and that he had the same

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understanding with him with reference to the contract which he entered into in 1887. It appears from the undisputed testimony that Mr. Wiley had no authority from the defendant company to vary these specifications for ties, and had no authority to accept red-oak ties for the company. A large number of ties were delivered along the line of the defendant's road during the year 1887, under the contract made with Mr. Wiley, the timber agent, but, before they were inspected and accepted by the defendant, Mr. Wiley resigned his position, and Mr. Petheram was appointed in his stead.

The plaintiff testified, and the testimony is undisputed, that the ties which he put in during the year 1887 were subject to inspection by the defendant company. Some dispute arose between the plaintiff and the defendant company with reference to the quality of the ties which he had delivered along the road under his claimed contract with Mr. Wiley. The company refused to accept or to inspect the red-oak and split ties as No. 1 ties, but insisted that they were of the grade of culls. Thereafter the following correspondence was had between Mr. Robinson and Mr. Mulliken, and between Mr. Robinson and Mr. Petheram: A letter of January 20, 1888, from Mr. Robinson to Mr. Mulliken, is a request for the inspection of the ties. The letter from Mulliken to Robinson, of January 24, in reply, states that—

"All written contracts for ties or other material made by Mr. Jefferson Wiley will be carried out to the letter, but he had no authority to make verbal arrangements, and we shall not recognize such. We will, however, take all ties that are made in conformity with our specifications for this year at such prices as may be agreed upon between the parties furnishing them and our present lumber agent, Mr. J. W. Petheram."

A letter of January 26, from Robinson to Mulliken, in reply to his of the 24th, states that—

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"My contract with Mr. Wiley is written, not verbal. The prices specified are forty-five cents for No. 1 oak ties, forty cents for Nos. 2 and 3. In addition to these he contracted to give me a margin above this for all I could get out up to November 1. As I have had considerable money wrapped up in these ties for the last three months, I should be glad to meet Mr. Petheram very soon."

A letter from Mr. Robinson to Mr. Petheram, of February 9, relates to the ties which were gotten out after November 1, 1887, and also containing the following:

"I wish to ask you to allow us a fair price for red oak. Those ties are worth more than hemlock ties, and no fault of ours that they are out, as I, in common with others, thought the company wanted them. There are some who put in such ties on my contract. These parties paid five cents per tie for the timber, eight cents for sawing, two cents for hauling to the track, besides the labor of hauling them from the woods. I am not paying more than I get for them, yet the company is a gainer by having them for ten cents. It is a hardship to many of these poor men who have been misled."

A letter of February 13, from Robinson to Petheram, expresses a wish to contract for 5,000 oak ties, and a request that he send copies of specifications, so that there will be no excuse for mistakes. A letter of February 16, written by Petheram to Robinson, acknowledges the receipt of Robinson's letters of February 9 and 13, relative to ties, stating that his instructions were from the general manager to take ties that were on the track previous to November 1, and saying:

"The only arrangement I will make about ties with you is this: I will inspect ties that I am assured were delivered previous to November 1, and apply on old contract, but I will not inspect and apply on old contract ties that I have positive proof were not so delivered. Ties that have been delivered since that time I will inspect, subject to our present specifications, at a rate to be agreed upon between you and myself, namely, thirty-

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eight for No. 1, twenty-eight for No. 2, and thirty-three for No. 3; but these prices or agreements will not be carried out unless accepted by Tuesday, the 21st inst. I may be at Vestaburg on that day. Regarding the R. R. ties, they are culls. It has been the custom to pay ten cents for culls. Ten cents may be paid for these culls, or I may decide not to take them at all. Oftentimes men put on ties reserving the culls. As to tie-makers having been misled, they are generally the parties who try to do the misleading, and red-oak ties are what they use for the purpose of so doing."

A letter of February 20, from Robinson to Petheram, reads as follows:

"*Dear Sir:* In reply to yours of recent date, I appeal to you in behalf of some men who put in the red-oak ties for what it seems to me to be justice, when we consider the D. L. & N. has taken those red-oak ties for years at white-oak prices. At the same time I expected your decision would be final, so I accepted it."

After referring to some other matters, he concluded his letter as follows:

"I hope you will come Tuesday, as I want my ties inspected, and need the avails."

The ties were inspected, and a statement thereof and a check dated March 14, 1888, for $2,689.74, payable to Mr. Robinson, were delivered to and accepted by him. The statement referred to, attached to the check, reads as follows:

"D. L. & N. R. R. Co.,

"*To J. W. Robinson, Dr.* March, 1888.

"Business address, Vestaburg, Mich.

March 7.

For ties, No. 1 white oak, 1,180 ties, at forty-five cents	$ 531 00
No. 2 white oak, 2,143 ties, at forty cents	857 20
Culls, 6,990, at ten cents	699 00
Total	$2,087 20

"For G. R. L. & D., material account. Paid February, 1888.

"H. B. SEAGRAVES, S. K.

"Approved, J. B. MULLIKEN, General Manager.

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"VESTABURG, March 15, 1888.

"Received, D. L. & N. R. R. Co., $2,087.20, in full of above account,"—

To which Mr. Robinson added the words "on account," and signed the voucher. On the same day, and after receiving the check, Mr. Robinson sent the following written protest to the defendant:

"VESTABURG, MICH., March 15, 1888.

"To THE D. L. & N. R. R. Co.:

"I protest against Mr. J. W. Petheram's inspection, or Parmelee's, of the oak ties gotten out as per agreement with Mr. Wiley as unjust and unfair to me, inasmuch as I claim a margin on said ties that was promised me by said Wiley. J. W. ROBINSON."

This suit is brought to recover the value of the red-oak and split ties, which Petheram rejected as culls. Two special questions were submitted to the jury:

"1. Were the ties described in Wiley's letter of August 16, 1887 ['*Dear Sir:* Answering yours of August 15, I would say the prices I will allow you in the future will be: For No. 1, forty-five; for No. 2, forty; No. 3, forty cents'], as No. 1's, 2's, and 3's, intended by the parties to be same grades as were described by like numbers in the written contract under which plaintiff had previously furnished ties?

"*A.* No.

"2. *Q.* Was the inspection of the ties in question made by Petheram and Parmelee in pursuance to the following correspondence: Letter from Robinson to Mulliken, January 20, 1888; letter from Mulliken to Robinson, January 24, 1888; letter from Robinson to Mulliken, January 26, 1888; letter from Robinson to Petheram, February 9, 1888; letter from Robinson to Petheram, February 13, 1888; letter from Petheram to Robinson, February 16, 1888; letter from Robinson to Petheram, February 20, 1888?

"*A.* Yes."

The plaintiff made no requests of the court to instruct the jury, and the court, in his charge to the jury, presented the claims of the parties as developed by the testi-

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mony in a very plain and impartial manner, fully as favorable to the plaintiff as the testimony would warrant, and the jury found a verdict of no cause of action.

The case is brought here upon writ of error, and 21 errors are assigned. Nine of them relate to the rulings of the court upon the admission or rejection of testimony. We discover no error in the rulings upon these points. The balance of the errors assigned relate to the charge of the court. It will be a needless waste of time to embrace the charge of the court and the exceptions to it in our opinion, as it laid down the rules of law correctly under the testimony in the case. The court instructed the jury that—

"There are some letters in evidence by both Petheram and Robinson, by Robinson to Petheram and by Petheram back to Robinson, in regard to that inspection. You have those letters before you, the situation of the parties, and what was done, and from all that evidence I leave that as a question for you to settle: Did Robinson consent to be governed by Petheram's inspection? If he did, that ends this case. He cannot recover."

The jury found specially, as before stated, in answer to the second question, that the inspection of the ties in question was made in pursuance of that correspondence.

The fifteenth assignment of error is as follows:

"The court erred in instructing the jury in said cause, as follows:

"'Now, gentlemen, had that bill of the—as to these ties, the different quantities, been forwarded to the general office at Detroit, or wherever it may be, to the general manager, and he had sent back the bill to Mr. Robinson, and sent a check for the payment of the bill based upon that inspection, and the bill had been forwarded to him for that amount, and Mr. Robinson had received it without any protest or objection, and receipted in full for the ties, I think that he would be bound by it; that should be treated as a receipt in full; that he could not recover more, as the evidence is in this case, without showing

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that there was any duress, or anything to show that he was obliged to act as he did.'"

Regarding the fifteenth assignment of error, the counsel for the plaintiff states that the court in effect charges—

"That the acceptance of a check in full settlement of account to date, based upon that inspection, would be a bar to the plaintiff's action, unless plaintiff had saved his rights by proper objection and protest, or had been under duress, etc.," and he insists that "this is in direct conflict with the decision of this Court in the case of *Mortlock v. Williams*, 76 Mich. 568, in which case the question was squarely raised, and in a very clear opinion by Justice LONG it is held that the acceptance of such a check would be no bar."

The case of *Mortlock v. Williams* is very different from this. In that case the court passed upon the effect of the receipt, and took the case from the jury; but in this case, following the instruction quoted in the assignment of error, the court continued his charge as follows:

"But, under the circumstances of the case, I submit that to you. You have what Mr. Robinson did at the time, as shown by the evidence in this case; you have the way he says he received the check, what he wrote upon the receipt; the paper, so-called protest, that he gave to the agent at Vestaburg, and all the other evidence in the case that bears upon that question. Was it received by Robinson as a settlement of his claim against the railroad company? It is perfectly competent for persons having disputed rights to go and settle, and, if they do, it is binding. If these propositions are found in favor of the plaintiff's claim, then comes the question as to the value of the ties accepted."

Thus it is seen that the whole question as to whether it was a conclusive and binding settlement was left to the jury to determine, under the circumstances of the case.

We find no error in the record, and the judgment is affirmed.

MORSE, MCGRATH, and GRANT, JJ., concurred. LONG, J., did not sit.

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CHRISTIAN G. BAISCH ET AL. v. THE CITY OF GRAND RAPIDS AND CHARLES S. WILSON.

Municipal corporations—Board of public works—Specifications of proposed improvement—Estimates.

By section 8 of the board of public works act of the city of Grand Rapids (Act No. 321, Laws of 1873) it is made the duty of the board, when the common council decide that the construction of a sewer is a necessary public improvement, to determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work and of the material to be used in detail, and cause to be prepared the necessary plans and specifications, and report their estimate to the common council as a basis for assessing or otherwise raising the funds necessary to enable the board to go forward and complete such work. Prior to the presentation to the board of the resolution of the common council as to the construction of a certain sewer, the city surveyor had made the necessary surveys, examinations, and estimates, and had prepared a full and complete plan and profile of the proposed sewer, showing in detail the manner of its construction, and its size and shape and the kind and quantity of materials to be used, the cost of which construction and materials was not carried out in detail, but was susceptible of computation by any member of the board or common council from the *data* thus furnished. On receiving the resolution for the construction of the sewer, the board of public works directed the city surveyor to prepare the necessary plans and specifications, and he at once presented the ones he had prepared, which were examined and approved by the board at the same meeting; which action is held a substantial compliance with the provisions of the section cited.

Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued January 16, 1891. Decided February 27, 1891.

Bill to restrain the sale of land for a tax assessed for the construction of a sewer. Complainants appeal from

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decree dismissing bill. Decree affirmed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for complainants.

William Wisner Taylor, for defendants.

LONG, J. The bill is filed in this cause to restrain the sale of complainants' land for a tax assessed to pay the expense of the construction of a sewer in the alley between Coit avenue and Clancy street in the city of Grand Rapids. The bill was dismissed on the hearing in the court below. Complainants appeal. The pleadings and proofs are before us for review, and are set out in full in the record.

It appears that on May 21, 1888, the common council adopted a resolution by a vote of a majority of all the aldermen elect declaring the construction of the sewer in question a necessary public improvement, and that on the 26th of that month, at a regular meeting of the board of public works, the clerk presented a copy of this resolution to it, and by resolution of that board the city surveyor was directed to prepare the necessary plans and specifications. It is shown by the record that the city surveyor, prior to these directions from the board of public works, having been advised of the resolution passed by the common council, had made the necessary surveys, examinations, estimates, etc., and had prepared a full and complete plan and profile of the sewer, showing in detail scale, size, length, etc., of the same; and upon the adoption of the resolution by the board of public works, and on the same evening, he presented the same to the board, which at once approved and adopted the same, and by resolution directed the president of the board to advertise for sealed proposals for the construction of the sewer. This notice was duly published in the official city paper

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from May 29 to June 2. There being but one bid, it was rejected by the board, which instructed the president to advertise again, and such readvertising was done; and on June 9 the bids were opened, and the contract let to the lowest bidders, Wagemaker & Meyer, for $2,300. This action was duly reported to the council on June 11, and a contract also at the same time presented, which the mayor of the city, by resolution of the council, was directed to execute, which was done. Aside from the estimate for the work of construction, the city surveyor also had placed in the estimates the following: Assessment and printing, $60; engineering and incidentals, $90; making the total estimate of cost the sum of $2,450. The sewer was duly constructed according to the terms of the contract.

The council, after the making of the contract, took steps to ascertain what property in the city was benefited by the improvement, and on August 6, 1888, appointed a committee of three to locate and fix the district. This committee reported on August 20, and defined the district, their report being accepted and adopted; and on October 1 the council, by resolution, declared that the whole amount of $2,450 be assessed thereon, and the commissioners directed to make the assessment, which they did, and reported the roll to the council on October 8. The time for hearing appeals was then fixed for October 15, the notice, as required by the charter, being duly given for that purpose. Three appeals were heard at that meeting, and the time then extended for one week to hear other appeals. The time was again extended, appeals heard, and the subject referred to a committee, who reported to the council that the assessment roll did not include the entire frontage, and there was an error in the resolution and order of assessment; they therefore recommended that the assessment be set aside, which report

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was accepted and adopted. A new committee to locate a district was duly appointed, and such proceedings had that a new roll was reported to the council, which was adopted, notice published of hearing appeals, and the roll on January 14, 1889, duly approved and confirmed. There is no complaint of any proceeding subsequent to the confirmation of the roll. It is insisted on the part of the city that these proceedings have all been regular, and in full compliance with the provisions of the charter. So far as any complaint is made of the assessment, that question is settled by *Brown v. City of Grand Rapids*, 83 Mich. 101.

The only question which we need discuss arises under complainants' contention that the board of public works failed to determine the kind and quantity of materials, and to estimate in detail the cost and expense of the work and material. In other words, it is claimed that the board failed in the performance of its duty in its action upon the resolution reported to it from the common council, in that it made no examination of the premises through which the proposed sewer was to be constructed, but, on the same evening the resolution of the council for the construction of the sewer was received, the board, without examination of the land or the proposed improvement, accepted the report of the city surveyor, which he had previously prepared; that this was not such action on the part of the board as is required by section 8 of the board of public works act. That section provides as follows:

"When the common council of said city decide that the construction of any public work in said city is a necessary improvement, the board of public works, with all convenient dispatch, shall determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work and of the material to be used in detail, and cause to be

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prepared, so far as necessary, plans and specifications for such work, and report their estimate to the common council as a basis for assessing or otherwise raising, according to law, the funds necessary to enable the board to go forward and complete such work." Revised Charter 1883, p. 129 (3 Laws of 1873, p. 57).

The record contains a profile of the proposed sewer, showing the depth of cut, and the fall, together with stand-pipes for connections of lateral sewers. There are also the plans and specifications, covering nearly seven pages of the printed record, setting out in great detail the manner of construction and the size and shape of the sewer, and the kind, quality, and quantity of materials to be used, not only for the sewer, but also for the stand-pipes, lateral sewers, and connections, catch-basins, manholes, and the mode and manner of construction, and quantity and quality of materials, and the manner in which the work, and all parts of it, is to be done. These plans and specifications and the profile were submitted to the board on the evening of their receiving the resolution from the common council, and, after an examination of them by the board, they were approved by an indorsement written thereon as follows:

"Approved and adopted by the board of public works, May 26, 1888.

"GEORGE G. BRIGGS, President."

We think this was a substantial compliance with section 8 of the board of public works act above quoted. It is claimed by counsel for the complainants that this was not an estimate of the cost and expense and material to be used in detail. The cost of the material and of construction is not carried out in detail, but from the profile and plans and specifications it was susceptible of computation by any member of the board or common council. All the necessary *data* were there, and it was sufficient to enable the bidders to make intelligent bids. It is true

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that it was the estimate of the city surveyor; but, when submitted to and approved by the board of public works, it was the estimate of the board, and it was in such form as to give the board all the necessary *data* to take intelligent action.

Some other questions are raised, but we do not deem them of sufficient importance to notice. From a review of all the proceedings we are satisfied that the requirements of the charter have been substantially complied with.

The decree of the court below dismissing complainants' bill must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. GRANT, J., did not sit.

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BETHUEL C. FARRAND ET AL. v. JOHN B. PETIT ET AL.

Will—Suspension of power of alienation.

This case involves the construction of a will, certain clauses of which are held to be void for attempting to suspend the power of alienation contrary to the provisions of How. Stat. §§ 5530, 5531.

Appeal from St. Clair. (Canfield, J.) Argued January 16, 1891. Decided February 27, 1891.

Bill for construction of will. Complainants appeal. Affirmed. The facts are stated in the opinion.

Stevens & Merriam, for complainants.

N. E. Thomas, for defendants.

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CHAMPLIN, C. J. This is a bill filed to obtain the construction of a will. The facts and the law are sufficiently set forth in the decree of Hon. Arthur L. Canfield, the circuit judge who heard the case below, which we adopt as our opinion in this case, and which reads as follows:

"This cause having been brought on to be heard upon the pleadings filed therein and the proofs taken in open court, and the arguments of H. W. Stevens, of counsel for the complainants, and N. E. Thomas, of counsel for the defendants John B. Petit, Frank B. Petit, Edward Smith, Frederic Smith, and Victoria Gilbert, and guardian *ad litem* and of counsel for the infant defendants, Florence Smith, Franc Smith, Stella Petit, Kennith Petit, Earl Petit, Frances Petit, Katherine Petit, Louisa Petit, and Charlotte Petit.

"And it appearing to the court that Edward Petit, late of the city of Port Huron, in the county of St. Clair, departed this life in the year 1875, testate; and that his last will and testament, and the codicils thereto, as set out in the bill of complaint, were duly proved, admitted to probate, and allowed in the probate court for the county of St. Clair, in the State of Michigan, as and for his last will and testament, on the 8th day of April, 1875.

"That said Edward Petit at the time of his decease was seised of a portion of the west half of the north-west quarter of section fifteen, in town six north, of range seventeen east, in the county of St. Clair, in the State of Michigan, and designated and described in said will as 'My homestead of sixty-five acres.'

"That in and by said will the complainants, Bethuel C. Farrand, Marshal N. Petit, and Louisa Smith, were named as executors and executrix of said will, and by the terms thereof the said testator granted, conveyed, transferred, and set over, in trust for the uses and purposes in said will expressed, all of his property and estate, real and personal, of which he died seised and possessed, the same to be had and held by them in trust as aforesaid, to their successors in said trust, and their assigns forever, giving and granting to said executors and executrix and the survivors of them, or to their successors in said trust, authority and power to sell and deed and convey, according to the true intent and meaning of said will, any and all of the property of his said estate left in their hands by the terms of said will.

"That in and by one of the codicils of said will said testator gave and bequeathed to the defendants Frank B. Petit and John B. Petit, to each, one undivided half of block one hundred and seventy-two of the unrecorded plat, called the 'Petit Plat,' and made by I. D.

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Carleton, to have and to hold said block to said Frank and John, their heirs and assigns, forever, to be given to them when they respectively should become twenty-one years of age; that said Frank and John are now both past the ages of twenty-one years, and said executors and executrix have conveyed to said John and Frank the said block; that in and by the same codicil to said will the said testator gave and bequeathed to the complainant Louisa Smith the brick house and block of lots on which the same stands, and in which said testator then lived at the time of his decease; that said block one hundred and seventy-two, and said block of lots on which said house stood, were included in, and were a part of, the land covered and platted by said unrecorded plat, called the 'Petit Plat,' made by I. D. Carleton, and were a part of said west half of said north-west quarter of section fifteen, and the title to said block one hundred and seventy-two and said block of lots has become vested by the terms of said will in the said defendants John B. Petit and Frank B. Petit and the complainant Louisa Smith.

"That all of the remainder owned by said testator of said west half of the north-west quarter of section fifteen remains undisposed of by said will, and goes by law to the heirs of said Edward Petit, deceased, unless the same was disposed of by the sixth and seventh clauses of his said will; that said clauses of said will are in the following language, to wit.:

"'*Sixth.* The remaining portion of my homestead place of sixty-five acres, not including the house and block of lots on which the same stands, shall (before my executors shall deem it best to have the same cut up into lots and blocks and streets, as herein provided for) be for the use and occupation of my said sons, who shall be entitled to use and occupy the same until the same shall be otherwise disposed of. I direct that, whenever the public good and the best interests of my estate require the same, this portion of my estate shall be laid out and platted into lots, blocks, and streets, and that so many of the lots shall be sold as may be necessary to make a fund, the interest of which will be sufficient to pay the taxes and expense of platting and taking care of the same, and that the remainder thereof shall be kept by my executors for twenty years after my decease, when the same shall be divided and distributed as follows, viz: To the children of my daughter Louisa, one-fourth, to be divided equally between them as they respectively attain the age of twenty-one years, those having attained that age having theirs conveyed to them at that time; to the children of my son Marshal, one-fourth thereof, to be conveyed to them as they respectively become twenty-one years of age; to the children of said Frank Petit, one-fourth thereof, to be conveyed to them in equal shares thereof as they respectively become twenty-one years of age; and to the children of my son John Petit, one-fourth thereof, to be conveyed to them respectively as they become twenty-one years of age; to be had, held, and enjoyed by them, their heirs and assigns, forever.

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"*Seventh.* In case of the death of any of my said sons without issue, and before his portion has been conveyed to him, then, and in that case, the share that has been herein provided for said son shall be equally divided between his surviving brothers and his said sister, Louisa Smith, such share falling to her to be invested for her benefit, and she to receive the use thereof as herein provided for her receiving other portions of my estate; and in case any of my said sons at the expiration of twenty years after my decease shall be living and without issue, then I direct that the portion herein provided to be given to such children shall be conveyed to him, his heirs and assigns, forever. And the said homestead and fourteen lots hereby reserved for the use of the said Louisa during her life-time, including the brick house, after the decease of my said daughter, and after the expiration of the said twenty years after my decease, I direct shall be divided and distributed among the children of my said children in the same way, manner, and proportions as herein provided for the other part of my said homestead, viz: To Louisa's children one-fourth, to Frank's children one-fourth, to Marshal's children one-fourth, and to John's children one-fourth, to be held by them, their heirs and assigns, forever. And if at the time of any such division of the last portion of my said estate any of my said sons are living without issue having been born to them, then that one-fourth of the same shall be conveyed to such of them as shall be in such a case, to be held by them and their heirs and assigns forever.'

"And the court further finds that the complainants are entitled to the relief prayed for in the bill, and to have a construction by this court of said will as prayed for; and in the construction of said will the court finds that the testator, in and by said sixth clause, undertook to suspend the power of alienation of the property therein mentioned for a longer time than is permitted by the statutes of this State, and said clause is therefore void as being contrary to the provisions of sections 5530 and 5531 of Howell's Statutes; and the same is true of said seventh clause of said will, in so far as the same attempts to provide for the disposition of said property.

"That the property mentioned in said sixth and seventh clauses as 'the remaining portion of my homestead place of sixty-five acres,' except the parts thereof given in the other parts of said will to John and Frank and to Louisa, as hereinbefore stated, was not disposed of by said will, and the trust created by said will, in so far as its operation and effect upon said property goes, is void; and that said testator, Edward Petit, deceased, died intestate as to said property, and the same, upon his decease, fell to, and the title thereto, vested in his heirs at law.

"That the heirs at law of said Edward Petit at the time of his decease were the complainants Marshal N. Petit and Louisa Smith, and the defendants John B. Petit and Frank B. Petit, and that the defendants Edward Smith, Frederic Smith, Florence Smith, Franc Smith, Victoria Gilbert, Stella Petit, Kennith Petit, Earl Petit,

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Frances Petit, Katherine Petit, Louisa Petit, and Charlotte Petit took and have no interest in or to said property under said will.

"And this court doth therefore order, adjudge, and decree that the said sixth clause of the will of said Edward Petit, deceased, is void, and that the seventh clause of said will, in so far as it relates to the property devised by said sixth clause, is also void and inoperative, and that the trust created in and by said will in favor of the executors and executrix of said will does not affect or extend to the property mentioned in said sixth clause of said will, and said heirs of said Edward Petit took the same as if no trust had been created in and by said will in favor of said executors and executrix.

"And this court doth further order, adjudge, and decree the complainants Marshal N. Petit and Louisa Smith, and the defendants John B. Petit and Frank B. Petit, upon the decease of said Edward Petit, became the owners of all of said land mentioned in the sixth clause of said will, and that the defendants Frederic Smith, Edward Smith, Florence Smith, Franc Smith, Victoria Gilbert, Stella Petit, Kennith Petit, Earl Petit, Frances Petit, Katherine Petit, Louisa Petit, and Charlotte Petit obtained no rights or interest in said land under said will.

"It is the further judgment and decree of the court that the complainants do pay the costs of this suit of the defendants, to be taxed out of the estate of said Edward Petit, deceased, and that all necessary costs and expenses by them incurred in and about this cause be paid and reimbursed to them out of said estate."

The decree of the circuit court is affirmed. The costs of this Court will be paid out of the estate in the hands of the executors, and the record will be remanded to the court below for the enforcement of the decree.

The other Justices concurred.

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JOHN FOX v. THE PENINSULAR WHITE LEAD & COLOR WORKS.

Master and servant—Negligence—Evidence—Instructions to jury—Certiorari.

1. It is the province of the jury to determine which theory of opposing expert witnesses is the true one.
2. Evidence that defendant's superintendent notified other employés than the plaintiff, but not in his presence, of the dangerous character of the common employment, is inadmissible to rebut the testimony of plaintiff that he was not so informed, and of another employé that he was told by the superintendent not to give such information to the employés.
3. Testimony in behalf of the plaintiff in a negligence case that, after he had sustained the injury complained of, all employés were required to and did sign a contract waiving all claim for damages on account of injuries received from the *same source*, and that danger signals were put up in the shop where they were employed, is properly rejected.
4. The contents of medical books are not competent evidence. *Marshall v. Brown*, 50 Mich. 148; *People v. Millard*, 53 Id. 63, 77; *People v. Vanderhoof*, 71 Id. 158, 179.
5. It it not the duty of an employer to inform an employé of the particular ingredients used in the manufacture of Paris green, if he is notified of their poisonous character, and of the precautions to be used against the dangers incident to working at the vats.
6. It is error for the circuit judge to enter the jury-room and give instructions to the jury without the presence of counsel or the court stenographer, which facts are properly brought before this Court by writ of *certiorari* in aid of and in connection with the writ of error.[1]

Error to Wayne. (Hosmer, J.) Argued January 21, 1891. Decided February 27, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

[1] See *People v. LaMunion*, 64 Mich. 709.

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James H. Pound (C. J. Lowrie, of counsel), for appellant.

Cutcheon, Stellwagen & Fleming, for defendant.

MORSE, J. The defendant is engaged in the manufacture of paints, dry colors, Paris green, and other poisons at Detroit. About June 12, 1888, the plaintiff was employed by the defendant corporation, and worked five days. He was first put to work cutting chromo yellow, a few hours. After that he was directed to take wet Paris green out of filters with a trowel, and put it in shallow tin pans on a board. After the first day he worked at stirring up the ingredients in vats, cleaning out vats, and in carrying dry Paris green to the dry-room. The boiling mass in the vats was heated to a high degree, and his business was to stir it until it was thoroughly dissolved.

He brings this action for damages, claiming that he was a common laborer, ignorant of the constitutents of the vats, and of the dangerous character of his employment, or that the substances handled by him were so poisonous as to endanger his health; that it was the duty of the defendant to notify him of the poisonous character of the substances used in his employment, and that the vapor arising from the boiling vats was poisonous and dangerous when inhaled, and to provide him with appliances, to wit, rubber garments, boots, gloves, respirators, and sponges, to be used and worn by him in his employment, so as to prevent the poisonous materials, and the steam arising therefrom, from coming in contact with, and from being inhaled and absorbed into, his body and system; that defendant did not perform this duty, by reason of which plaintiff was greatly injured and damaged.

The testimony shows that the plaintiff, soon after he

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commenced work, began breaking out on the exposed parts of his body, and at the end of the five days had to quit work, and finally went to Harper's Hospital. There seems to be no doubt that these sores were caused by mineral poison coming in contact with his skin while in his employment with defendant. It was further claimed that this poisoning, and the inhaling of the vapor or steam from the boiling vats, caused partial paralysis of his lower limbs, and permanent injury to his health. This was denied by the defendant, and testimony of experts was given tending to show that the symptoms of paralysis, defective eye-sight, and other permanent ailments were those of white lead poisoning, and not of arsenic, it being shown that he had worked in white lead works before his employment by defendant. The jury rendered a verdict for the defendant. The plaintiff brings error.

The record shows that plaintiff, by his counsel, contended that the vapors or steam that arose from the tubs or vats in which the arsenic and sulphate of copper were dissolved to form Paris green, which plaintiff inhaled, were poisonous and deleterious to human health, and in such vapor and steam would be carried small particles of the arsenic and copper, which, in coming in contact with his skin, and particularly the soft spongy parts of the body, would poison and injure him, and produced the evidence of medical experts to sustain this contention; while the defendant claimed that such vapors would be composed entirely of water, and therefore harmless, and also sustained its theory by the evidence of medical experts. The court seems to have accepted the testimony of the defendant's experts as conclusive, and refused to permit the plaintiff's counsel to argue to the jury that plaintiff received any part of his injuries from the inhaling of the vapors, and directed the jury that the plaint-

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iff could not recover upon this branch of his claim; basing his opinion upon the testimony of defendant's foreman, who gave evidence that the minerals used did not become fused in vapor until they were heated to 250 deg. fahrenheit, and stated that a heat of 150 deg. was all that was needed to manufacture Paris green. This was clearly error. It was for the jury, and not for the court, to determine which theory of the experts was the true one.

It is suggested by defendant's counsel that, inasmuch as it was conceded that the pustulation or breaking out upon the body was caused by contact with the arsenic, and the court directed the jury that the plaintiff was entitled to recover his damages suffered by such pustulation, unless it was shown that the defendant notified him of the danger of the arsenic touching the body, and its poisonous character, and, under this direction, the jury found for the defendant, therefore it must be considered that the jury found he had such notice; and consequently, if the question of inhalation had been submitted to them, the verdict nevertheless would have been the same. But we find nothing in the record showing that he was notified of any danger in inhaling these vapors, and therefore a new trial must be granted. In view of this disposition of the case, we will notice such assignments of error as we deem important and likely to arise again upon another trial.

The plaintiff proved by the testimony of himself and by Charles Brangshed, who was foreman while plaintiff was employed by defendant, that he was not informed of the dangerous proprieties of Paris green. Brangshed went further, and testified that he had been told by the superintendent, one Abel, not to tell the men at work there, because if they knew that the contents of the vats were 800 pounds of arsenic in one vat in a powder, and about

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700 pounds of sulphate of copper, and about the same weight of soda, these being the ingredients of the vats, they would not continue to work there.

"I was told not to tell the folks that was around there what the stuff was. I was not told not to tell whether it was Paris green or not, but I was told not to let the folks know what the stuff was,—what we used it for. I was told not to let the employés know what the ingredients were which entered into Paris green. I had the formula. I was told not to let any one know what the stuff was."

The defendant was permitted, in rebuttal of this testimony, to prove by men who worked there at other times than while plaintiff was employed that the superintendent informed them of the dangerous character of the work. The superintendent was not sworn to dispute Brangshed's testimony, nor was his absence accounted for. The admission of this proof was also error. And the testimony of employés to the same effect, while the plaintiff was working there, was not admissible relative to what the superintendent told them, unless it was shown to be in the presence and hearing of plaintiff. The fact that the plaintiff's counsel, in his opening, stated that no caution was given to any of the men in defendant's employ could not render excusable the introduction of this testimony. The fact in issue was whether or not the defendant notified the plaintiff of the danger, and the evidence in regard to notice should have been confined to this issue. It would have been competent to have shown by Abel that he never told Brangshed to keep the men in ignorance of the poisonous nature of the materials used, but the fact that the superintendent notified other men of their danger could not be used to disprove Brangshed's statement of what the superintendent told him, or as tending to show that plaintiff was notified.

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It was not competent to show that, since the plaintiff's injury, contracts had been drawn up by the defendant, and the men required to sign them, waiving all damages on account of injuries that might be received from the poisonous qualities used in their work; nor that danger signals had been put up in the shops. This proffered testimony was properly rejected.

The plaintiff's counsel attempted to show by some of their medical experts that certain medical works, naming them, were standard authorities. No previous mention of these works had been made, or reference to them by any of the medical witnesses. The court committed no error in refusing to permit the witnesses to answer the questions. The counsel's object, as they state in their brief, was to show that their witnesses were sustained in some of their testimony by standard medical authorities. We have held that this could not be done. The contents of medical books are not competent testimony. *Marshall v. Brown*, 50 Mich. 148; *People v. Millard*, 53 Id. 63, 77; *People v. Vanderhoof*, 71 Id. 158, 179. It would be difficult, we think, to show that a medical witness was sustained by a medical book, to which he had not referred, without showing what the book contained, or that it held what the witness testified, which would be the same thing.

The court was correct in charging the jury that it was not the duty of the defendant to inform the plaintiff of the particular ingredients or the formula used in the manufacture of Paris green, if he was notified of their poisonous character, and the precautions to be used against the dangers of working at the vats.

It is complained that the circuit judge practically told the jury that, if they found that the plaintiff knew Paris green was a poison, this would defeat his action, although he was not aware of its effect upon the system if handled as he was working with it. The instructions, taken as a

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whole, may be open to this complaint. A man might know that Paris green was a poison if taken internally, but not know that it would cause pustulation by handling, or be absorbed into the system, and cause poisonous effects, from contact with the outer surface of the body. It was the duty of the defendant not only to inform the plaintiff that it was a poison, but of the effect it might produce to one working in its manufacture without taking due precaution; and the precaution necessary to be taken should have been pointed out, if known to the defendant, and all proper and reasonable appliances and facilities provided to guard against the dangers to be encountered in the employment. Then the person taking the employment would assume the risks of it.

We find but one other error necessary to be noted. The action of the circuit judge in entering the jury-room, and giving them instructions, without the presence of counsel or the court stenographer, is properly brought before us by the writ of *certiorari* in aid of and in connection with the writ of error, and we think such action was error.

The judgment is reversed, and a new trial granted, with costs of this Court to the plaintiff.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

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Head-note references are to pages.

Cross-references are to *subjects;* and the number of the note is added in parenthesis, unless the reference is to all.

ABANDONMENT—See HIGHWAYS (5).

ACCOUNTING—See EQUITY PLEADING; PARTNERSHIP (3).

ADVERSE POSSESSION—See EJECTMENT.

AFFIDAVIT—See ATTACHMENT SUIT (2).

AGENT—See FIRE INSURANCE (6).

ALLOWANCE TO WIDOW—See ESTATES OF DECEASED PERSONS.

AMENDMENT—See PARTIES (3); PLEADING (4).

APPEAL.

Error cannot be assigned upon the refusal of the circuit court to vacate a statutory judgment rendered against a surety in an appeal-bond on his petition and accompanying affidavits. *Buehler v. DeLemos*, 554.

APPOINTMENT—See ELECTIONS (1).

ARBITRATION—See FIRE INSURANCE (3).

ASSAULT AND BATTERY—See EVIDENCE (8, 9, 12, 18); SELF-DEFENSE.

ASSIGNMENT FOR BENEFIT OF CREDITORS—See CONTEMPT.

ASSIGNMENT OF ACCOUNT—See CORPORATIONS.

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ASSIGNMENT OF ERROR.

1. An assignment of error that the judge erred in giving that portion of his charge commencing, "I give you these requests on the part of the plaintiffs," and ending with, "I give you these requests on the part of the defendant," is too general, where twelve requests are involved, the most of which were correct propositions of law. *Pratt v. Burhans*, 487.
2. Error cannot be assigned upon the refusal of the circuit court to vacate a statutory judgment rendered against a surety in an appeal-bond on his petition and accompanying affidavits. *Buehler v. DeLemos*, 554.

ATTACHMENT SUIT.

1. A return by an officer to a writ of attachment, issued against two joint debtors, that he had attached the goods of one of them, upon whom he had made personal service, and that after diligent attempts he was unable to find the other defendant in his county, and had left a certified copy of the attachment and inventory with the defendant in whose possession he found the attached goods, the other defendant having no last place of residence in the county, is in accordance with How. Stat. § 6841, and authorizes the justice to proceed under How. Stat. § 6845. *Buehler v. DeLemos*, 554.
2. An averment in an affidavit for attachment that there is a debt due to the plaintiff from the defendants upon express and implied contract is equivalent to averring that the debt is due upon express and upon implied contract, and is sufficient. *Id.*

See CHATTEL MORTGAGE (1).

ATTORNEY AND CLIENT.

1. The receipt by a plaintiff of the money due upon a judgment rendered in his favor, and its discharge by indorsing a satisfaction thereof upon an execution issued for its collection, estop him from denying the authority of the attorneys to act for him in its procurement, and, if their original employment is not shown, such acts are a full and complete ratification of their acts and services in obtaining the judgment. *Lindner v. Hine*, 511.
2. The lien of an attorney at law attaches to the money payable to his client upon a judgment if it is the proceeds of the attorney's labor and skill, and to moneys received by the

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ATTORNEY AND CLIENT—Continued.
client by way of a compromise of such judgment, who, if he settles the case after judgment, so as to deprive the attorney of his costs and fees, is liable to him in the proper action. *Id.*

ATTORNEY FEES—See COSTS (3).

AUDITOR OF WAYNE COUNTY—See ELECTIONS (1).

AUTHORITY OF AGENT—See INSURANCE (1).

BILL OF EXCEPTIONS—See PRACTICE IN SUPREME COURT (1).

BILL OF PARTICULARS.

1. A specification in a bill of particulars of an item of plaintiff's demand as two-thirds of whatever sum remained in defendant's hands of $412,250, received by him for certain bonds and stock of a specified railroad company, after paying certain notes, describing them, but not giving their amount, is too uncertain and indefinite in the amount claimed, and should be amended or made more specific in this respect. *Hamilton v. Peck*, 398.
2. An order requiring a plaintiff to file an amended or more specific bill of particulars, under a common-count declaration in *assumpsit*, showing how and by what right and when the plaintiff or his assignors became entitled to each item of plaintiff's claim as stated in his original bill of particulars, and how and when he acquired such right, calls for information not required to be given in a bill of particulars. *Id.*
3. The following general propositions are summarized from the opinion:

a—By the practice of this Court, certain items are proveable under the common counts in *assumpsit*, and upon demand a bill of particulars of such items must be furnished, which must be sufficiently specific and certain to apprise the defendant of what the demand is, and when the items accrued, and how it arose, and the amount claimed.

b—The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy.

c—If the specifications in a bill of particulars do not accord substantially with the facts, or omit essential matters,

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BILL OF PARTICULARS—Continued.

the other party can take advantage of this upon the trial.

d—It mentioning dates, it is not necessary that the exact date shall be given, but it may be stated as "on or about a certain day," and in that case the plaintiff is not restricted to proof of that special day. The question to be determined at the trial in each case is whether the proof is so variant from the date alleged as to mislead the opposite party.

e—A bill of particulars is not required to contain all of the essentials of a special declaration. It is neither given nor required for the purpose of disclosing to an adverse party the proof relied on to substantiate the same; nor is it the office of such bill to furnish the defendant facts whereon to found an affirmative defense. It need not state the grounds on which the plaintiff claims, but only the items and particulars. *Id.* 394.

BILLS AND NOTES.

1. Complainant was induced to sign two promissory notes as surety for the maker under such circumstances as prevented their enforcement except in the hands of an innocent holder, which notes were received and held by a bank as additional security to the maker's dishonored note. And it is held that the bank parted with no value, and is not an innocent holder of the notes, and that equity will enjoin their collection. *Henriques v. Ypsilanti Savings Bank*, 168.
2. A banking firm received from a customer the promissory note of a third person, not yet due, as collateral security for a loan made to the customer, which was not evidenced by any writing. Nine days afterwards, and after the note was due, the customer gave the bankers his note for the amount of the loan, drawing interest at ten per cent., and the bankers continued to hold the first note as collateral to the second note, but without the consent of the maker, which latter holding is held to be subject to any defenses which existed between the maker of the note and the customer. *City Bank of Dowagiac v. Dill*, 549.

See LAND CONTRACT; PARTNERSHIP (1, 5); PLEADING (1).

BILL TO SET ASIDE DEED—See EQUITY.

BOARD OF SUPERVISORS—See TAXES (7, 8).

BOHEMIAN OAT NOTE—See PLEADING (1).

BONDS—See MUNICIPAL CORPORATIONS (1).

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BURDEN OF PROOF—See LOGS AND LOGGING (2).

CERTIFICATE—See TAXES (11).

CERTIORARI—See PRACTICE IN CIRCUIT COURT (4).

CHAIRMAN OF BOARD OF SUPERVISORS—See TAXES (7).

CHARGE TO JURY—See DAMAGES (7); PRACTICE IN SUPREME COURT (1, 3).

CHARTER OF GRAND RAPIDS—See CONSTITUTIONAL LAW (12, 13); MUNICIPAL CORPORATIONS (3, 5).

CHATTEL MORTGAGE.

1. A resident of Nebraska gave a chattel mortgage to a resident of the same state, who filed it under the law of that state, and left the property in the possession of the mortgagor, who brought it to Michigan without the knowledge or consent of the owner of the mortgage, where it was attached at the suit of the mortgagor's creditors. And it is held that the attachment lien must prevail over that of the mortgage. *Corbett v. Littlefield*, 30.
2. How. Stat. § 6193, providing for the filing of chattel mortgages, applies only to mortgages of goods and chattels which are capable of delivery, and not to an assignment of open accounts. *Preston National Bank v. Smith Middlings Purifier Co.*, 364.
3. The lien of a chattel mortgage covering all additions to and substitutes for the property described in the mortgage will not attach to goods ordered by the mortgagor before giving the mortgage, and which never actually came into his possession as owner. *Kingman & Co. v. Denison*, 608.

See CORPORATIONS; REPLEVIN (4, 5).

CIRCUIT JUDGES—See PRACTICE IN CIRCUIT COURT (1, 4).

CIRCUIT JUDGE OF KENT COUNTY—See CONSTITUTIONAL LAW (4–6).

COMPENSATION—See PARTNERSHIP (4).

COMPROMISE—See EVIDENCE (14).

CONDEMNATION PROCEEDINGS.

1. Where a jury in condemnation proceedings disagree, and are discharged, the members of the panel are disqualified to sit as jurors in new proceedings to condemn the same land

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CONDEMNATION PROCEEDINGS—Continued.

for the purposes mentioned in the first petition. *Hester v. Chambers*, 562.

2. Where in such a case a juror, upon his examination as to his qualifications, denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the contesting party was ignorant of his having acted as a member of the former panel, and of the submission of the question of such necessity to him as a member thereof, until after the second proceedings were ended, he is entitled to have the verdict set aside and to a new trial. *Id.*

See CORPORATIONS; COSTS (3).

CONDITIONAL SALE—See SALE (3).

CONDITION SUBSEQUENT.

A condition following the grant of a life-estate in land, prohibiting its conveyance by the grantee, is held in this case to be a condition subsequent, if effectual for any purpose, and to defeat the estate to which it is annexed only at the election of him who has a right to enforce it. *Hayward v. Kinney*, 591.

CONSTITUTIONAL LAW.

1. The tax law of 1889 (Act No. 195) is held to be constitutional. *Auditor General v. Sloman*, 118.
2. The Court decline to pass upon the question of the constitutionality of section 24, tit. 5, Act No. 455, Local Acts of 1889, authorizing the city of Saginaw to issue its bonds for the purpose of raising money with which to purchase a site and erect thereon a city hall in said city, and making it the duty of the common council to proceed immediately to procure such site, and construct said city hall within designated boundaries as to location, complainants not being in a position to raise such constitutional question. *Carlisle v. City of Saginaw*, 134.
3. Act No. 254, Laws of 1889, which provides for *cumulative* voting in districts entitled to more than one Representative in the State Legislature, is unconstitutional. *Maynard v. Board of Canvassers*, 228.
4. It was the plain intent of the constitutional amendment of 1889, empowering the Legislature to provide for the election of more than one circuit judge in the judicial circuit com-

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CONSTITUTIONAL LAW—Continued.

posed of the county of Kent, to place such additional judge under the provisions of the Constitution and laws of the State applicable to existing circuit judges, and that his term of office should be limited and governed by the Constitution, and that his successor should be chosen at the same time and in the same manner as the other circuit judges. *Attorney General v. Burch*, 408.

5. It was competent for the Legislature, at once upon the adoption of the amendment, to create the office of such additional circuit judge, and to prescribe his duties, which office became vacant as soon as created, whether the Legislature so declared or not, and which vacancy the Legislature had the power to authorize the Governor to fill provisionally, by appointment, until the next general election. *Id.*

6. Act No. 97, Laws of 1889, creating an additional circuit judge in the judicial circuit composed of the county of Kent, and declaring the office vacant, and providing for the filling of such vacancy by appointment by the Governor, *in so far* as it undertakes to fix the term of the appointee, and to declare that it shall not expire until December 31, 1893, is unconstitutional, his constitutional term only extending to the next general election, or until his successor was elected and qualified. *Id.*

7. Under a resolution of the State Senate dispensing with the reading of the daily journal for the session, and authorizing the secretary to make all necessary corrections in the journal from day to day, he is held authorized to correct an entry which by mistake stated that the vote taken on the passage of a bill was reconsidered, by stating at the close of the journal, and on the page before his certificate, under the head of "*Errata* in the Record of Bills," that the vote reconsidered was that by which the Senate had concurred in certain House amendments to the bill, which correction might be so made at any time prior to the final adjournment. *Id.*

8. In such a case, where it does not affirmatively appear at what time the secretary made the correction, it will be presumed to have been made on or before the date of his certificate, and, if the final adjournment was had on that day, it will also be presumed to have been made before such

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CONSTITUTIONAL LAW—Continued.

adjournment, and that it was authorized by the Senate, and that the true journal entry of the proceeding is as corrected by the "*errata*." *Id.* 409.

9. Where a Senate bill, after having passed that body and been given immediate effect, is amended in the House, and there given immediate effect, a concurrence by the Senate in such amendments must be considered as a concurrence in the order that they take immediate effect, and a separate vote by the Senate that the bill *as amended* take immediate effect is unnecessary. *Id.*

10. An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action. *Adsit v. Osmun*, 420.

11. While there may be cases where a person will not be punished with costs for not taking action in opposition to a law appearing upon the statute-books before the same is declared unconstitutional, when such costs are in the discretion of the court, yet no rights can be founded upon such a law; nor can any person or persons be deprived of any rights or privileges because such a law has been apparently legally enacted, and appears in the body of our laws. *Id.*

12. Amendments of a city charter containing no provision giving damages to parties injured by the regrading of streets, which provide for such damages and for their ascertainment and assessment, are within the general purposes of the incorporation act. *Sligh v. City of Grand Rapids*, 497.

13. Act No. 292, Local Acts of 1885, and Act No. 436, Local Acts of 1887, amendatory of the charter of Grand Rapids, in so far as they provide for assessments for the payment of damages sustained by the regrading of streets, are wholly inoperative, in that they fail to provide for notice to the parties who are to be assessed to satisfy the judgments recovered by land-owners entitled to such damages in proceedings provided for in said acts. *Id.*

CONTEMPT.

A complainant is guilty of contempt in filing a bill in a circuit court other than that having jurisdiction of proceedings under an assignment for the benefit of creditors, to enjoin a sale of the assigned property on the ground of the invalidity

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CONTEMPT—Continued.

of the assignment, which question will not be tried on an application for *mandamus* to vacate an order adjudging the complainant guilty of such contempt. *Smith v. Circuit Judge*, 564.

CONTRACT.

A daughter lived with her father as a member of his family for some eleven years after attaining her majority, but without any contract for hire, and with no other relation than that of father and daughter, and a member of the family, he promising to do something for her, and making a liberal provision for her in his will. And it is held that she had no valid contract which she could enforce either against him or his estate. *Ionia County Savings Bank v. McLean*, 626.

See LOGS AND LOGGING (1).

CORPORATIONS.

The by-laws of a corporation provided that one person might hold the offices of president, treasurer, and general superintendent, and vested in the president the general supervision of the property and affairs of the corporation, and in the treasurer the custody of its funds and valuable papers, with power to collect and pay out all moneys and sign all acceptances and notes in its behalf, while the superintendent was given general supervision and management of its affairs, subject to the president and board of directors, with power to make all contracts in its behalf except when otherwise provided by the by-laws. The same person held the three offices for five years, and managed and controlled the affairs of the corporation, if not without advice, certainly without objection, on the part of the stockholders or directors, and finally assigned to a bank, to secure existing indebtedness and that which should be thereafter incurred, $150,000 of good and collectible accounts, then existing or thereafter acquired, to be held by the bank as collateral security for existing and future indebtedness of the corporation. The corporation made an assignment for the benefit of its creditors, and the bank filed a bill to enforce the agreement, which is held to have been one which the president, treasurer, and superintendent had the power to make, and to be enforcible

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CORPORATIONS—Continued.

by a court of equity. *Preston National Bank v. Smith Middlings Purifier Co.*, 364.

See EVIDENCE (6).

CORRECTING JUDGMENT—See PRACTICE IN SUPREME COURT (3).

COSTS.

1. The State is not liable for costs in case of a decision in *favor* of a contesting tax-payer in proceedings under the tax law of 1889 for the sale of lands delinquent for taxes. *Auditor General v. Baker*, 113.
2. Costs are only recoverable when there is statutory authority awarding them. *Hester v. Commissioners of Parks and Boulevards*, 450.
3. There is no statutory authority for awarding either witness or attorney fees in condemnation proceedings under Act No. 388, Local Acts of 1889, relating to parks and boulevards in the city of Detroit. *Id.*
4. Where the record is printed solid, and in such small type as to make its reading exceedingly difficult, the appellant will not be allowed costs. *Davidson v. Bennett*, 614.

See CONSTITUTIONAL LAW (11); DAMAGES (4).

CRIMINAL LAW—See LIBEL AND SLANDER (5, 6).

CUMULATIVE VOTING—See CONSTITUTIONAL LAW (3).

DAMAGES.

1. In a suit to recover for milk-cans sold to a creamery company, the defendants sought to recoup damages for loss of profits arising, as claimed, from a breach of the agreement of the vendors to protect the defendants in the *exclusive* use of that kind of can in specified territory. The testimony failed to show that, if other creameries had not used the can in the territory, the residents therein would have furnished cream to defendants in preference to the other creameries in *other* cans, but did show the refusal of a portion of such residents to supply defendants with cream in the kind of cans purchased. And it is held that there was nothing tangible upon which the jury could base an estimate of defendants' loss of profits on account of such competition. *Davis v. Davis*, 324.
2. Evidence that defendants purchased 800 of the cans, and only used 550, when plaintiffs only contracted to furnish them

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DAMAGES—Continued.

600, is held inadmissible, it not being competent to show such excess, and the price paid, for the purpose of laying before the jury the amount of money invested by defendants in the cans. *Id.*

8. The testimony showed that the amount of cream received by defendants, with that furnished to other creameries in the territory referred to, only amounted to one-half the daily capacity of defendants' creamery. And it is held that testimony as to the profits which defendant could have made on each pound of butter made during the season, provided the creamery was run to its *full* capacity, was incompetent, there being no *data* before the jury from which to find such a verdict. *Id.* 325.

4. A judgment in justice's court, based upon the service of a summons by a private person, who was not properly designated for that purpose under the statute, was affirmed on special appeal in the circuit court, and reversed in the Supreme Court, with costs to the defendant. And it is held that all of the damages suffered by the defendant were the result of the decisions of the courts in holding that the summons was legally served, and for which he had received the full benefit of the only remedy afforded by law, viz., a judgment for costs. *Stimer v. Bryant*, 466.

5. How. Stat. § 8314, which permits the personal representatives of a deceased person whose death was caused by the wrongful act, neglect, or default of another to bring an action for the damages thereby sustained, clearly contemplates that pecuniary injury must result from such act, neglect, or default, which must be alleged in the declaration and shown by the evidence. *Hurst v. Detroit City Railway*, 539.

6. In a suit by the administrator of the estate of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. § 8314, for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded, and established by the evidence. *Id.*

7. The charge of the court on the question of damages as measured by the life expectancy of the plaintiff is held not open to the objection that it misled the jury so that they gave plaintiff what he had lost by his inability to labor

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DAMAGES—Continued.

between the time of his injury and the trial, and then included the same time in their calculation as to his future loss. *Kinney v. Folkerts*, 617.

See EVIDENCE (8, 9, 17); LIQUOR TRAFFIC (2); LIBEL AND SLANDER (1, 2); REPLEVIN (2, 3, 5).

DEDICATION—See HIGHWAYS (2, 7).

DEED—See EQUITY.

DE FACTO OFFICERS—See OFFICERS DE FACTO.

DELIVERY—See SALE (6).

DEPOSITION.

A stipulation for taking the deposition of a witness in another state provided that it should be taken on the direct and cross interrogatories annexed to the stipulation before a designated county judge, on the corporal oath of the witness, to be first administered by the commissioner. The deposition was to be annexed to the interrogatories and stipulation, and returned by mail to the clerk of the court where the suit was pending. The papers were received by the clerk inclosed in a sealed envelope, but not so attached together. The affidavit of the witness was attached, in which he swore that his answers to the interrogatories propounded to him by the county judge were true and correct; and the judge certified that the witness was duly sworn before the questions were asked, and was sworn to the answers after they were given. And it is held that, the deposition having been taken under stipulation, the Court are not inclined to reject it because of the failure of the commissioner to attach the papers together; and that the return shows that the witness was sworn both before and after giving his testimony. *City Bank of Dowagiac v. Dill*, 549.

DEPOSITORY OF PUBLIC FUNDS OF WAYNE COUNTY.

Act No. 393, Local Acts of 1879, authorizing the county treasurer and board of auditors of Wayne county to designate a depository for the public funds, is construed as follows:

a—In making such designation the treasurer and board have an equal voice.

b—Such designation is good and valid until the expiration of the term of office of the county treasurer, and until a new designation is made by his successor and the board of

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DEPOSITORY OF PUBLIC FUNDS OF WAYNE COUNTY—Continued.
auditors, which it is their duty to make as soon as convenient after the treasurer qualifies and enters upon the discharge of the duties of his office, and without unnecessary delay.
c—Until such new designation is made, it is the duty of the treasurer to deposit the public funds in the existing depository or depositories. *City Savings Bank v. Huebner*, 391.

DESIGNATION—See DEPOSITORY OF PUBLIC FUNDS OF WAYNE COUNTY.

DETROIT POLICE COMMISSIONERS—See PUBLIC OFFICERS.

DISCHARGE OF MORTGAGE—See MORTGAGE (7).

EJECTMENT.

1. The presumption that the continued occupancy of land by a grantor after its conveyance and the recording of the deed is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of the grantee, can only be overthrown by circumstances tending to show a clear renunciation of such tenancy, brought home to the grantee, and of a subsequent exclusive, adverse possession by the grantor under a claim of superior right. *Paldi v. Paldi*, 346.
2. Where a grantor remains in possession of the granted premises in subordination to the rights of the grantee, and during such occupancy buys in an outstanding tax title, the recording of the tax deed is not, standing alone, such an assertion of an independent, hostile title as will entitle the grantor to recover for improvements made after securing such tax deed, but a claim of an adverse holding thereunder must have been expressly asserted and brought home to the grantee. *Id.*

ELECTIONS.

1. The death of a person elected to the office of auditor of Wayne county before he has qualified, and before the expiration of the term of office of the incumbent, creates no vacancy that the Governer can fill by appointment, but the full term must be filled by a special election under How. Stat. §§ 138 (subd. 3), 141; the case being ruled by *People v. Lord*, 9 Mich. 227. *Lawrence v. Hanley*, 399.
2. An election to fill a vacancy, of which no notice is given, and which is in fact known to but few of the voters, is void. But though the official notice was not given, or, if given,

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ELECTIONS—Continued.

not in the prescribed form, yet if the election has been held, and the great body of the voters had notice *in fact* of the vacancy, this, coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election, is sufficient, even though many refrained from voting because of a difference of the construction of the law. *Adsit v. Osmun*, 420.

3. The question to be considered in these cases is whether the want of the *statutory* notice has resulted in depriving sufficient electors of the opportunity of voting to change the result of the election; and the election should not be set aside when it is apparent that the result would not have been different had all the electors voted. *Id.*

See CONSTITUTIONAL LAW (3–6).

ENTRANCE FEES—See REPLEVIN (3).

EQUITY.

Complainant filed a bill to set aside a deed of his farm which he had executed and delivered to his son; and upon a review of the evidence it is held that the only conditions imposed by complainant upon the delivery of the deed were the execution of a life-lease to complainant, and of a mortgage for $1,000 to defendant's sister, which conditions have been performed. *Ladu v. Ladu*, 469.

See BILLS AND NOTES (1); CORPORATIONS.

EQUITY JURISDICTION—See NUISANCE.

EQUITY PLEADING.

After filing a bill for an accounting as to the amount due on a mortgage which was in process of foreclosure at law, the complainant tendered to the mortgagee the amount due upon the mortgage, and the costs of the foreclosure, which tender was accepted, but afterwards treated as a partial payment, and the sale made. The facts of such tender and sale were not put in issue by the pleadings, but were shown by the proofs; and on an appeal from a decree dismissing complainant's bill it is held that the subsequent transactions by which the mortgage lien was discharged could only be shown by a new or supplemental bill, and the decree is reversed, and the case remanded, with leave to complainant to file such supplemental bill, the proofs already taken to stand as proofs

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EQUITY PLEADING—Continued.
in the case, with leave to put in such other proofs relating to the new matter put in issue as the parties may deem best. *Fisher v. Holden*, 494.

EQUITY PRACTICE—See EQUITY PLEADING.

ESTATES OF DECEASED PERSONS.

1. An order closing the hearing of claims against an estate, made within the year allowed for its settlement, and after the expiration of the time fixed for the presentation of claims, but without proof of notice to creditors to present their claims, will not operate to close the estate so as to prevent the making of an order for an allowance to the widow for the support of herself and the minor children during the progress of such settlement. *North v. Van Tassel*, 69.
2. It is for the probate court to determine, upon proper showing, the allowance to be made for the support of the widow and minor children during the progress of the settlement of an estate which is specifically devised and bequeathed, and the proportion each part of the estate shall contribute to the payment of such allowance. *Id.*

See PLEADING (2–4); WILL.

ESTOPPEL—See ATTORNEY AND CLIENT (1); HIGHWAYS (2); LIFE INSURANCE (1); PRACTICE IN CIRCUIT COURT (3).

EVIDENCE.

1. A witness may state whether or not a person had the appearance of being intoxicated, such statement not being mere opinion, but the statement of a fact. *Cook v. Standard Life & Accident Insurance Co.*, 12.
2. Parol testimony is admissible to show that joint grantees are husband and wife where the fact of such relationship is not stated in the deed. *Auditor General v. Fisher*, 128.
3. The *fact* whether or not the requisite number of persons have signed a petition for the improvement of a street, when the power to make it depends upon the signatures to the petition of a given number or proportion of the property-holders to be affected, can be inquired into, and the want of such number of signatures shown as a defense, in an action to collect the assessment, if the statute governing the proceeding does not provide that the determination of the proper municipal board shall be *conclusive* on the subject. *Id.*

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EVIDENCE—Continued.

4. The statements of one partner that notes given by him in the firm name were used in his private business, made after the notes were given and not in the presence of the payee, are not competent evidence of such fact in a suit upon the notes. *Towle v. Dunham*, 268.

5. A statement made by a party at and during the time of a transaction is admissible as showing what the transaction was. *Id.*

6. How. Stat. § 7545, which excludes the testimony of a party to a suit which is prosecuted or defended by a corporation, in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within that of any surviving officer or agent, is held not to apply to the testimony of a plaintiff in a negligence case against a railroad company to an interview with the yard-master, since deceased, in the presence of the master of the round-house, who survives him. *Lyttle v. Chicago & West Michigan R'y Co.*, 290.

7. Evidence in a replevin suit for goods the title to which the plaintiff claims to have retained until paid for, or sold in due course of trade, of alleged false representations as to the financial standing of the person to whom the goods were delivered, but which the plaintiff testifies he did not rely upon in making such delivery, is immaterial, and should be striken out on motion of defendant's attorneys. *Pratt v. Burhans*, 487.

8. A defendant cannot give in evidence in mitigation of damages for an assault the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction. *Millard v. Truax*, 517.

9. To entitle the defendant in an action for assault and battery to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the feelings and passions excited by it. *Id.*

10. How. Stat. § 8314, which permits the personal representatives of a deceased person whose death was caused by the wrongful act, neglect, or default of another to bring an action for the damages thereby sustained, clearly contemplates

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EVIDENCE—Continued.
that pecuniary injury must result from such act, neglect, or default, which must be alleged in the declaration and shown by the evidence. *Hurst v. Detroit City R'y*, 539.
11. In a suit by the administrator of the estate of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. § 8314, for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded, and established by the evidence. *Id.*
12. Where a plaintiff in a civil suit for assault and battery admits on cross-examination that he used abusive, insulting, and profane language towards the defendant prior to the assault, he may give the language used on his redirect examination. *Kent v. Cole*, 579.
13. A defendant in a trespass suit for assault and battery may be asked, for the purpose of impeachment, if he has not stated, at a given time and place, to a designated person, that he meant to have killed the plaintiff, and if he had it to do over again he would kill him. *Id.*
14. Offers of compromise cannot be considered as an admission of liability. *Montgomery v. Allen*, 656.
15. It is the province of the jury to determine which theory of opposing expert witnesses is the true one. *Fox v. Peninsular White Lead & Color Works*, 676.
16. Evidence that defendant's superintendent notified other employés than the plaintiff, but not in his presence, of the dangerous character of the common employment, is inadmissible to rebut the testimony of plaintiff that he was not so informed, and of another employé that he was told by the superintendent not to give such information to the employés. *Id.*
17. Testimony in behalf of the plaintiff in a negligence case that, after he had sustained the injury complained of, all employés were required to and did sign a contract waiving all claim for damages on account of injuries received from the *same source*, and that danger signals were put up in the shop where they were employed, is properly rejected. *Id.*
18. The contents of medical books are not competent evidence. *Id.*

See DAMAGES (1–3); DEPOSITION; EJECTMENT; LIBEL AND SLANDER (1, 3, 4).

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EXECUTORS AND ADMINISTRATORS.

An administrator cannot bind the estate by signing a petition for the improvement of a highway under a statute requiring the signatures of a majority of the *resident property-holders* upon such highway. *Auditor General v. Fisher*, 128.

See WILL.

EXHIBITS—See JURY (5).

EXPERTS—See EVIDENCE (15).

FALSE REPRESENTATIONS—See EVIDENCE (7).

FEES—See TAXES (1).

FELLOW-SERVANTS—See NEGLIGENCE (2, 3, 4, 6, 7).

FILING—See CHATTEL MORTGAGE (2).

FIRE INSURANCE.

1. An insurance adjuster and the agent of the assured spent several days investigating the loss, during which time a list of the personal property destroyed was made, signed, and sworn to by the agent, and an agreement arrived at as to the value of all of the buildings except the dwelling-house, which question was agreed to be submitted to arbitrators, with whom the adjuster and agent were to meet in five days, and close the matter up; but before the time arrived for such meeting the adjuster wrote that he could not meet at the time appointed, and the agent, relying upon this, did not make out the formal proofs of loss as required by the policy. Shortly after the expiration of time limited in the policy for making such proofs, the adjuster inquired of the agent if they had been sent to the company, and was informed that the agent supposed that the proofs had been already made out except as to the house, and as to that he had been waiting on the motion of the adjuster. Soon after this interview the agent informed the company by letter of what had occurred between him and the adjuster, and asked for a speedy adjustment of the loss, and was notified by the general agents of the company that the adjuster denied the statements contained in the agent's letter, and that they were advised by their counsel that the policy was null and void. In a suit to recover the insurance, in which the foregoing facts were testified to by plaintiff's witnesses, the court instructed the jury that if the conduct and acts and con-

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FIRE INSURANCE—Continued.

versation of the adjuster would induce an honest belief on the part of the agent that the proofs that were being made, and certificates (of value) that were being furnished, and the negotiations that were being had, were all that were required by the company, and that the agent acted with an honest belief of such fact, which he was warranted from the facts in entertaining, as a reasonable man, the jury would be justified in finding a waiver by the company of formal proofs of loss; which charge is held to be sustained by the authorities. *Gristock v. Royal Insurance Co.*, 161.

2. An applicant for insurance informed an agent authorized to issue policies, on making an *oral* application for insurance, that there were certain mortgages on the property, and was informed by the agent that it was all right. The policy was issued, and in reporting to the company the agent stated that the property was not mortgaged. The policy provided that, if the property was or should be mortgaged without written notice by the assured to and the written consent of the company indorsed on his policy, it should be void. It also provided that agents had no authority to bind the company except strictly in accordance with the terms, conditions, limitations, requirements, and the actual issue of the policy, and that their acts, statements, or knowledge should not be held or claimed to have waived any of the conditions or stipulations of the policy, unless waiver was indorsed thereon in writing, signed by such agent. In a suit to recover the insurance the court instructed the jury that if they should find that, prior to the issuance of the policy, explicit, definite notice of the character and amount of the mortgages was given to the agent, so that with full knowledge of such incumbrances he issued and delivered the policy, and then failed to notify the company of the fact, the plaintiff would not be precluded from recovery, as the jury might treat the knowledge of the agent that of the company; which instruction is held to have been correct, within the former decisions of the Court. *Id.* 162.

3. The negotiations and agreement for arbitration set forth in head-note 1 were within the general authority of an insurance adjuster, and, in the absence of notice to the assured of a more limited authority, he had a right to rely upon such general authority, and act accordingly. *Id.* 163.

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FIRE INSURANCE—Continued.

4. Two sworn statements were made out by the agent of the assured, one of the personal property lost by the assured, and the other of that of the agent, both of which were introduced in evidence in a suit by the assured upon his policy. The agent testified on cross-examination that some of the articles listed in the statement of his loss belonged to the assured, and on redirect examination he testified that he never intended to state that he owned said articles. And it is held that the witness was entitled to testify to the mistake, and, as in so doing he would indirectly testify to his intention in making the list, no error was committed in refusing to strike out the testimony. *Id.*

5. On making a verbal application for fire insurance, the agent was informed (as found by the jury) that the applicant held the land on which the building stood under a land contract, and that it was incumbered by a mortgage. The policy insured the applicant to the amount of $1,000 on a certain building, locating it as to streets and occupancy, against loss or damage by fire, not exceeding the *interest of the assured* in the property, which interest was not stated. The policy was to be void, unless consent in writing was indorsed by the company, if the assured was not the sole and unconditional owner of the property; or if any building intended to be insured stood on ground not owned in fee-simple by the assured; or if the interest of the assured in the property was not truly stated; or if any change took place in the title, interest, location, or possession of the property, by sale, transfer, or conveyance, in whole or in part. In a suit upon the policy the company denied the plaintiff's right to recover, because of the violation of the foregoing conditions. And it is held that, if the company had desired to know what interest it was insuring, it should have stated it in that portion of the policy pertaining to the risk; and that, to give any reasonable force and effect to the clause requiring the indorsement of its consent in the case stated, it must be held to apply to changes in ownership *after* the delivery and acceptance of the policy. *Hoose v. Prescott Insurance Co.*, 309.

6. Where an agent whose authority is confined to soliciting applications for insurance, which provide that the company shall not be bound by any act done or statement made by

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FIRE INSURANCE—Continued.

or to any agent or other person not contained in the application, is *correctly* informed of the amount unpaid on a land contract under which the applicant holds, and by *mistake* or otherwise inserts a less sum in the application, which he fills out, and the applicant without carelessness on his part, and in reliance upon the act and conduct of the agent in preparing the application, signs it without reading it or having it read to him, and without notice or knowledge of such misrepresentation, which application is not attached to the policy, the company cannot avoid liability under a provision of the policy that by its acceptance the assured covenants that the application shall form a part of the policy, and a warranty by the assured. *Tubbs v. Dwelling-house Insurance Co.*, 646.

7. Failure to make proofs of loss within 30 days, as provided for in an insurance policy, will only operate to postpone the right of action of the assured until the proofs are supplied, where there is no limitation in the policy as to the time within which suit must be brought, nor provision for forfeiture in case proofs are not made within the 30 days. *Id.* 647.

8. Including articles not owned by the assured in his proofs of loss on the supposition that they are covered by the policy, and without fraudulent intent on his part, will not invalidate the policy. *Id.*

9. Where the conceded loss under a clause of an insurance policy exceeds the sum insured thereunder to an amount greater than the value of certain articles which the court instructs the jury plaintiff can recover for under said clause, the error, if one is committed, is not prejudicial to the defendant. *Id.*

See INSURANCE; LIFE INSURANCE.

FIXTURES.

It is now well settled in this State that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties. *Aldine Manfg. Co. v. Barnard*, 632.

FORM OF ACTION—See TAXES (15).

FRAUD—See JURY (4).

FRAUD OF AGENT—See LIFE INSURANCE (4).

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FRAUDULENT CONVEYANCES.

1. An assignment by an insolvent debtor of a life insurance policy payable to himself, his executors, administrators, or assigns, with intent to avoid the payment of his debts, is void as to creditors. *Ionia County Savings Bank v. McLean*, 625.
2. The question whether a transfer of property is void as to creditors cannot be affected by the fact that at the time the debts were incurred the creditors did not know that the debtor owned the specific property transferred. *Id.*

FRAUDULENT FORECLOSURE—See MORTGAGE (1).

GRAND RAPIDS CHARTER—See CONSTITUTIONAL LAW (12, 13); MUNICIPAL CORPORATIONS (3, 5).

GUARDIAN AND WARD.

A guardian has no authority to bind his ward by signing a petition for the improvement of a highway under a statute requiring it to be signed by a majority of the *resident property-holders* upon such highway. *Auditor General v. Fisher*, 128.

HEARING OF CLAIMS—See ESTATES OF DECEASED PERSONS (1).

HIGHWAYS.

1. Several persons who are encroaching upon a public street, but who are in no way connected with or dependent on each other in such action, need not be joined as defendants in a suit to remove an obstruction maintained by one of them. *Village of Grandville v. Jenison*, 54.
2. The failure by the public for 20 years to accept an offer by land-owners to dedicate land for a street, and its occupancy for 14 years more, by the owner of the land to which the easement was appurtenant, in such a way as to indicate a denial of any right of the public therein, will estop the public from asserting such right. *Id.*
3. The adoption by the public of a road laid out in *fact*, but not legally under the statute, and its use to the full extent that the public had occasion to use it for the statutory period, will constitute it a highway by user under Comp. Laws 1871, § 1268. *Id.*
4. Evidence of the general understanding in the community that a certain street in public use was a highway, and of

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HIGHWAYS—Continued.
the refusal of the supervisor to assess the land so used, although requested to do so, on the ground that it was a highway, is admissible to show its public character. *Id.*
5. The rights of the public in a highway will not be lost by anything short of an actual abandonment of the use by which they secured it. *Id.*
6. The statute does not fix the number who must travel upon a highway in order to determine whether it exists by user. It must be *used* by the public, and the public are all who have occasion to use it. *Id.*
7. The following general propositions are summarized from the opinion of Mr. Justice CAHILL:
a—Since 1827 the forms of law required to be followed in this State to effectuate a statutory dedication of land to public use have remained substantially unchanged. Changes have been made in matters of detail, but from the first the statute has required a plat or map showing the land intended to be dedicated to be made and acknowledged by the proprietor, and recorded in the office of the register of deeds.
b—The effect of such a statutory dedication has been to vest the fee in the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public; and it has therefore been held that nothing short of a strict compliance with the terms of the statute, as to the acknowledgment and recording of the plat, would constitute a *present* grant to the public.
c—The right to make common-law dedications is not abridged by the statutory regulations providing for dedications in certain specific ways.
d—Making a plat of land by the proprietor, showing lots, blocks, and streets, evidently for the use of those who shall come to occupy the property, and their subsequent sale in such subdivisions, according to the plat, is one of the clearest ways of declaring an intention to dedicate, and has been held to conclude the owner, so far as the rights of subsequent purchasers are concerned; but he is not concluded, as to the public, unless the dedication is accepted by the public; and such acceptance must be within a reasonable time. *Id.*
8. The fact whether or not the requisite number of persons

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HIGHWAYS—Continued.

have signed a petition for the improvement of a street, when the power to make it depends upon the signatures to the petition of a given number or proportion of the property-holders to be affected, can be inquired into, and the want of such number of signatures shown as a defense, in an action to collect the assessment, if the statute governing the proceeding does not provide that the determination of the proper municipal board shall be *conclusive* on the subject. *Auditor General v. Fisher*, 128.

9. A highway by user need not necessarily be of the statutory width, but it becomes such to the width and extent used. *Wayne County Savings Bank v. Stockwell*, 586.

10. A highway can be lost in whole or in part by non-user, but the portion kept in use will not be affected by the non-user of the remainder. *Id.*

HUSBAND AND WIFE.

A husband, who occupies land under a contract running to himself and wife *jointly*, cannot be counted as a *resident property-holder* under a statute which requires the signatures of a majority of such property-holders to a petition for the improvement of a highway upon which they reside, unless the petition is also signed by the wife. *Auditor General v. Fisher*, 128.

See EVIDENCE (2).

IMPROVEMENTS—See EJECTMENT (2).

INDIAN RESERVE—See PUBLIC LANDS.

INSURANCE.

1. An insurance company is bound by *verbal* statements made to its agent, and upon which it issues a policy and receives the premium; and it cannot repudiate in such policy the authority of the agent, or responsibility for his act. *Hoose v. Prescott Insurance Co.*, 309.

2. A warranty in an insurance policy that any application or statement connected with its procurement is true, and shall be a part of the policy, makes an oral application, and the accompanying statements made to the agent as to the condition of the title, a part of the policy. *Id.*

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INSURANCE—Continued.

3. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—In construing warranties in insurance policies, the prime object to be reached is the intention of the parties, which, when found, must control, and such warranties must be interpreted by the rules applicable to the interpretation of other mercantile contracts.

b—All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation, and wherever in a policy of insurance there is a clear breach of a warranty contained therein, however immaterial it may be, the policy will be avoided.

c—The reasons for such literal construction appear to be that insurance is granted on the faith of the accuracy of the statements made by the assured, the information concerning which is generally, and often exclusively, within his knowledge, and it is only just to an insurer, when he asks for positive and accurate information, that it should be given to him. It is in reliance upon the facts given that the contract of insurance is made, and the purpose of requiring a warranty is to dispense with inquiry, and cast upon the assured the obligation that the facts shall be as he represents them.

d—In arriving at the intention of the parties to an insurance contract, the court must look at their situation, the conditition of the thing insured, and what was said or done at the time the insurance was effected. If the representations of the assured are in writing, that is the evidence of what they are; but if the application and representations are verbal, oral proof is competent to establish the same. *Id.* 310.

See FIRE INSURANCE; FRAUDULENT CONVEYANCES (1); LIFE INSURANCE.

JOINDER OF RESPONDENTS—See QUO WARRANTO (2).

JURISDICTION—See CONTEMPT.

JURY.

1. Requests to charge which, in effect, treat the case as one to be disposed of by the court, are properly refused where there is some evidence to go to the jury in support of the theory of the opposite party, and which, if sustained, entitles him to a recovery. *Towle v. Dunham*, 268.

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JURY—Continued.

2. While separate items of testimony, standing alone, may not warrant the court in submitting the claim of a party in support of which they are offered to the jury, the court may be warranted in submitting all of the facts and circumstances which the evidence tends to establish, and in leaving it to the jury to determine, as a question of fact, whether all of the facts proven, and the inferences properly deducible therefrom, will, together with attendant circumstances, make out such claim. *Id.*
3. The finding of the jury on a disputed question of fact is conclusive. *Wolf v. Irwin*, 344.
4. In this case the judgment is reversed for the error of the court in deciding that plaintiff had been defrauded, which was a question for the jury. *Davidson v. Bennett*, 614.
5. Where exhibits have been fully proven and admitted in evidence, and their authenticity is unquestioned, and there is no testimony to impeach their contents, it is within the discretion of the trial court to allow them to be taken to the jury-room, although objection is made. *Tubbs v. Dwelling-house Insurance Co.*, 647.

See CONDEMNATION PROCEEDINGS; EVIDENCE (15); LIFE INSURANCE (2, 3); NEGLIGENCE (1); PRACTICE IN CIRCUIT COURT; PRACTICE IN SUPREME COURT (3); SALE (6).

KENT COUNTY CIRCUIT JUDGE—See CONSTITUTIONAL LAW (4–6).

LACHES—See MORTGAGE (6).

LAND CONTRACT.

The vendor in a land contract took the note of the vendee, which was signed by a surety, as security for the payment of the first installment due on the contract, after which he conveyed the land and delivered the note to his grantee, who paid him the full purchase price named in the contract. The grantee then purchased from the vendee his interest in the land, and the contract was surrendered to him, after which he conveyed the land by warranty deed, and sold the note, then past due, and the purchaser sued the maker and surety. And it is held that on the surrender of the contract the entire interest in the land merged in the vendor's grantee, who conveyed the land by warranty deed, and could not

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LAND CONTRACT—Continued.

thereafter maintain any action against the vendee to recover any portion of the purchase price under the contract, nor against the vendee and the surety upon the note, and the plaintiff, having purchased the note after maturity, stands in no better position than said grantee. *Ashoff v. Van Brunt*, 575.

LEGISLATIVE JOURNALS—See CONSTITUTIONAL LAW (7–9).

LIABILITY OF MARRIED WOMEN—See MARRIED WOMAN.

LIABILITY OF STATE—See COSTS (1).

LIBEL AND SLANDER.

1. The fact that an article is libelous *per se* does not render evidence of special damages, or of specific acts of others towards the plaintiff in consequence of its publication, admissible, unless alleged in the declaration. *McDuff v. Detroit Evening Journal Co.*, 1.
2. Under an allegation of general damages in a libel suit, the issue is, what damages has the plaintiff sustained *generally* in the community where he is known, by the publication of the libelous article? and not what he has suffered in individual instances where those who have known him have treated him differently from what they did before. In the latter case, if he wishes to recover damages, he must allege them. *Id.*
3. A son was made trustee of his father's estate, and changed his residence to accept the trust. He brought a libel suit for an alleged false publication charging him with having "got away with the property," and with leaving his parents in a starving condition, and on the trial one of his witnesses was asked if he did not send for plaintiff to come and take charge of the estate, and answered, under objection, that he did, the communication being made by letter; which testimony is held irrelevant, it being of no consequence *how* he came to take charge of the estate, but, if material, the letter was the only competent evidence of the fact. *Id.*
4. An editorial in a newspaper published in another state, referring to the subject-matter of an article for the publication of which a libel suit is brought, but which is not shown to have been based upon such publication, is inadmissible as evidence in said suit, and if admitted the error is not cured by striking it out of the case. *Id.*

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LIBEL AND SLANDER—Continued.

5. Prior to the passage of Act No. 192, Laws of 1879 (How. Stat. § 9315), the statutes contained no express provision for the punishment of libel and slander, but they were punishable as misdemeanors at the common law, under How. Stat. § 9261. *Glassmire v. Circuit Judge*, 447.
6. It was the evident intention of the Legislature in enacting Act No. 192, Laws of 1879 (How. Stat. § 9315), to exclude from its operation non-enumerated cases of libel and slander known to the common law, namely, where one is held up to contempt and ridicule, and possibly where one may be charged with having a loathsome disease. *Id.*

LIEN—See ATTORNEY AND CLIENT (2); CHATTEL MORTGAGE (1, 3).

LIFE-ESTATE—See CONDITION SUBSEQUENT.

LIFE EXPECTANCY—See DAMAGES (7).

LIFE INSURANCE.

1. The acceptance of a policy of insurance which expressly negatives the right of the agent to waive or alter any of its conditions estops the assured from setting up or relying upon any action on the part of the agent in opposition to such prohibition. *Cook v. Standard Life & Accident Insurance Co.*, 12.
2. Whether proofs of death comply with the requirements of an insurance policy is a question for the court, and if that issue is tendered by the defendant the proofs furnished may be put in evidence and read to the court, but they are matters in which the jury are in no way concerned. *Id.* 13.
3. In such a case, where there is no contention on the part of the company but that preliminary proofs were furnished in full compliance with the terms of the policy, it is error to permit the plaintiff to read such proofs in full to the jury, including an affidavit of an eye-witness of the accident causing death, the physician's statement, and the certificate of the coroner, which may have had their influence upon the jury, and have been taken by them as proof of the facts therein contained. *Id.*
4. A railroad switchman applied for insurance to an agent of a life insurance company whose powers were in no way restricted by the printed application, which the agent filled out, and a copy of which was delivered to the applicant with his policy. The applicant correctly stated to the agent

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LIFE INSURANCE—Continued.

his occupation, which rendered him uninsurable under the conditions of the policy, and the agent, in filling up the application, misstated such occupation, so as to avoid such conditions. And it is held that the assured, on discovering the fraud, had the right to rescind the contract of insurance, and show the facts as a defense in a suit by the company upon a note given for the premium. *Michigan Mutual Life Insurance Co. v. Reed*, 524.

5. How. Stat. § 4238, which protects the money payable on a life insurance policy taken out by a husband or father for the benefit of his wife or children from the claims of his creditors, does not cover the assignment to them of a policy payable to himself, his executors, administrators, or assigns. *Ionia County Savings Bank v. McLean*, 626.

See FIRE INSURANCE; FRAUDULENT CONVEYANCES (1); INSURANCE.

LIQUOR TRAFFIC.

1. A saloon-keeper is not authorized to sell liquor for medicinal use any more than for other purposes, and he cannot excuse a sale made to a man known by him to be in the habit of becoming intoxicated, by the plea that he relied upon the statement of the purchaser that he wanted the liquor for medicine; the Court distinguishing this case from *People v. Hinchman*, 75 Mich. 587, where the defendant was a druggist. *McDonald v. Casey*, 505.

2. On the trial of a suit brought by a wife against a saloon-keeper to recover damages occasioned by reason of the sale of liquor to her husband, the plaintiff denied that she ever consented to such sales during the time covered by her declaration, and the defendant denied that plaintiff ever forbade his selling liquor to her husband, as testified by her, and further testified that plaintiff told defendant several times to let her husband have liquor after defendant had refused so to do. And it is held that under such testimony the court was warranted in instructing the jury that the consent of the wife which would justify unlawful sales must cover the sales for which the action was brought. *Id.*

See EVIDENCE (1).

LOGS AND LOGGING.

1. In the absence of a contract between a log-running company and a log-owner, fixing the terms and price of running

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LOGS AND LOGGING—Continued.

his logs, the company is left, under the statute, to run such of the logs as obstruct the stream, and charge therefor a reasonable compensation. *Seaton v. Pere Marquette Boom Co.*, 178.

2. A log-running company is not entitled to charge for running any more logs than are delivered, unless it can show that those undelivered were lost without its fault, and the burden of proof is on the company to show such loss. *Id.*

3. A log-running company mailed to a log-owner a copy of the "rates and rules of service" adopted by the company in reference to running and delivering logs for the coming year, which provided that final settlement was to be made on the woods scale. The log-owner did not accept the terms and conditions of the company contained in the rules by signing the same, as requested, nor did he comply with the requirement of the rules in other respects; but some time after receiving such copy he filled out and signed, and forwarded to the company, a blank statement it had sent to him, showing the amount of logs put into the river by him, with certain other information as to log-mark, etc. And it is held that there was no such meeting of the minds of the parties as would justify the court in holding that they agreed upon the woods scale as determining the amount which should be paid for running the logs, or the amount of logs which should be delivered by the company. *Id.*

4. Where, in such a case, the log-owner claimed a large shortage in the amount of logs delivered as between the woods and mill scales, but, to secure their delivery, paid the running charges on the basis of the woods scale, under protest, and sued to recover back the overpayment, an instruction by the circuit judge that unless the jury were satisfied that the company, through its carelessness and negligence in running and delivering the logs, had failed to run and deliver to the plaintiff the amount mentioned in the woods scale, he would not be entitled to recover, but if, through such carelessness and negligence, the company had only run and delivered the quantity of logs shown by the mill scale, the plaintiff might recover, is as favorable as the company was entitled to. *Id.*

LOSS OF PROFITS—See DAMAGES (1-3).

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MANDAMUS.

1. Where an application for *mandamus* is heard upon petition and answer, the facts stated in the answer must be taken as true. *Auditor General v. Supervisors of Midland Co.*, 121.
2. A *mandamus* will be denied where it appears that the relief prayed for has been voluntarily granted by the respondent. *Electric Railway Company v. Common Council*, 257.
3. Title to office will not usually be settled in *mandamus* proceedings, but when a person in office *de jure et de facto* is interfered with by one whose lack of title is plain under adjudicated cases in our own courts, it is not only proper, but best, to settle the question by *mandamus*. *Lawrence v. Hanley*, 399.

See CONTEMPT.

MARRIED WOMAN.

This case is ruled by *Hirshfield v. Waldron*, 83 Mich. 116, in which it was held that a married woman is liable for the price of clothing purchased by her for a minor son, and charged to her by her direction, she agreeing to pay for the same. *Meads v. Martin*, 306.

MASTER AND SERVANT.

It is not the duty of an employer to inform an employé of the particular ingredients used in the manufacture of Paris green, if he is notified of their poisonous character, and of the precautions to be used against the dangers incident to working at the vats. *Fox v. Peninsular White Lead & Color Works*, 676.

See EVIDENCE (16); NEGLIGENCE (2–7, 10–12).

MEDICAL BOOKS—See EVIDENCE (18).

MILITARY RESERVATION—See PUBLIC LANDS (3).

MISDEMEANOR—See LIBEL AND SLANDER (5).

MITIGATION OF DAMAGES—See EVIDENCE (8, 9).

MORTGAGE.

1. This case involves the alleged fraudulent action of a father in securing the foreclosure of two mortgages upon land the title to which was in his wife at the time of her death, and obtaining the title growing out of such foreclosures, for the purpose of cutting of the rights of his infant daughters in the land as heirs of their mother, and an examination of the

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MORTGAGE—Continued.

entire opinion is essential to an understanding of the decision of the Court. *Lucas v. Parks*, 202.

2. After accepting a tender made by a mortgagor in *full satisfaction* of the mortgage debt, interest, and accrued costs of a pending statutory foreclosure, as understood by the parties at the time of such acceptance, the mortgagee cannot treat the transaction as a partial payment, and proceed with his foreclosure, and a sale made thereunder will be treated as absolutely void. *Fisher v. Holden*, 494.

3. A purchaser of mortgaged premises at an execution sale is a proper party defendant in a suit for the foreclosure of the mortgage. *Hayward v. Kinney*, 591.

4. There is no reason for making the holder of a tax title on mortgaged premises a defendant in a suit for the foreclosure of the mortgage, and where the complainant fails to show any other claim on his part the bill will be dismissed, with costs, as to such a defendant. *Id.*

5. Where in a foreclosure suit a defendant, in addition to claiming rights in the mortgaged premises as a subsequent purchaser at an execution sale, claims under tax titles, which cannot be litigated in said suit, no writ of assistance will be awarded to put him out of possession of the mortgaged premises. *Id.*

6. Twelve years, six months, and ten days after the maturity of a mortgage the owner commenced foreclosure proceedings by advertisement, under which he received a sheriff's deed, and in default of redemption brought ejectment to recover possession of the mortgaged premises, and recovered a judgment. After a new trial was granted, he *for the first time* discovered that the mortgage contained no power of sale, whereupon he sought to discontinue the suit, but the court allowed it to be prosecuted in the interest of certain beneficiaries under the mortgage, who discontinued it six months and twelve days prior to the expiration of twenty years from the maturity of the mortgage debt, and three months and eight days after such discontinuance the owner filed a bill to foreclose the mortgage, in which he alleged the foregoing facts, which are held sufficient to excuse the delay in commencing such foreclosure suit. *Id.*

7. A subsequent mortgagee, who takes his mortgage in reliance upon reliable information that a prior mortgage has been

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MORTGAGE—Continued.

discharged, will be protected if it turns out that the mortgage was in *fact* discharged. *Moran v. Roberge*, 600.

See EQUITY PLEADING.

MUNICIPAL CORPORATIONS.

1. The issuance of bonds by the common council of the city of Detroit to raise money to pay for lands purchased or condemned by the commissioners of parks and boulevards under section 15 of Act No. 388, Local Acts of 1889, need not be approved of by the board of estimates of the city, established by Act No. 488, Local Acts of 1887. *Commissioners of Parks and Boulevards v. Rush*, 154.
2. The condition attached by respondent to the use by the relator of wooden poles outside of the fire limits of the city, that it should furnish passengers with transfers on certain designated lines of its road without additional charge, is held inoperative and void, being in conflict with section 14, chap. 95, How. Stat. *Electric Railway Company v. Common Council*, 257.
3. Section 15, tit. 6, of the charter of the city of Grand Rapids, which provides that the plans and specifications of the work, for the payment of which an assessment is ordered to be made, may be *changed*, and the work added to or diminished, at any time before the completion of the assessment roll therefor, does not refer to the contract for the work which, under the charter, must be awarded to the lowest bidder; and the changes covered by section 15, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. *Ely v. City of Grand Rapids*, 336.
4. After the statute creating a liability on the part of cities for injuries sustained by reason of defective sidewalks took effect, it became the duty of such municipal corporations, if they continued to maintain sidewalks which were out of repair when such liability attached, to put them in good repair, and to keep them in a condition reasonably safe for public travel. *Tice v. Bay City*, 461.
5. By section 8 of the board of public works act of the city of Grand Rapids (Act No. 321, Laws of 1873) it is made the duty of the board, when the common council decide that the construction of a sewer is a necessary public improvement,

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MUNICIPAL CORPORATIONS—Continued.

to determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work and of the material to be used in detail, and cause to be prepared the necessary plans and specifications, and report their estimate to the common council as a basis for assessing or otherwise raising the funds necessary to enable the board to go forward and complete such work. Prior to the presentation to the board of the resolution of the common council as to the construction of a certain sewer, the city surveyor had made the necessary surveys, examinations, and estimates, and had prepared a full and complete plan and profile of the proposed sewer, showing in detail the manner of its construction, and its size and shape and the kind and quantity of materials to be used, the cost of which construction and materials was not carried out in detail, but was susceptible of computation by any member of the board or common council from the *data* thus furnished. On receiving the resolution for the construction of the sewer, the board of public works directed the city surveyor to prepare the necessary plans and specifications, and he at once presented the ones he had prepared, which were examined and approved by the board at the same meeting; which action is held a substantial compliance with the provisions of the section cited. *Baisch v. City of Grand Rapids*, 666.

NEGLIGENCE.

1. The court cannot properly pass upon the question of negligence, except in cases where the facts are such that all reasonable men would be likely to draw from them the same inference. *Sadowski v. Michigan Car Co.*, 100.
2. The doctrine of the non-liability of the master for injuries sustained by a servant through the negligence of his fellow-servant has no application unless the one injured and the one at fault were engaged in the same general employment, and whatever conflict has arisen in cases has been as to what should be considered the same general employment. *Id.*
3. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appli-

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NEGLIGENCE—Continued.

ances when provided, and are not, as to each other, fellow-servants. *Id.*

4. In this case a common laborer employed in a lumber-yard is held not to have been a fellow-servant with a yard foreman and his men, who by the direction of the superintendent dug a ditch in which to lay a water-pipe, and left it uncovered, whereby the laborer was injured. *Id.*
5. The closing of a railroad switch, and the removal of the lights, with notice to engineers of passenger trains, who were required to slow up in passing it when in use, that it was abandoned, and that the track was thereafter to be treated as if no switch were there, and its reopening without any notice to such engineers, and without their knowledge, and its use without such lights, make a clear case of negligence against the company, if the presence of such lights would have prevented the running of a passenger train into the switch, which question, in case of conflicting testimony, is for the jury. *Town v. Michigan Central R. R. Co.*, 214.
6. In such a case it was contended by the company that the absence of the lights was not the proximate cause of the accident; that, if the switch had been locked, the train would have passed in safety; and that the opening or unlocking of the switch was caused either by the intermeddling of a stranger or trespasser, or by the negligence of fellow-servants of the plaintiff; and that he could not recover in either event. And it is held that if the lights would have prevented the accident in the condition in which the switch was, by giving timely warning of the danger, the negligence of the company in reopening it for use without replacing the lights was just as much the proximate cause of the injury as the unlocking and turning of the switch rails; and if they were concurrent causes, the defendant would be liable. *Id.*
7. It was further contended by the company that the negligence, if any, in not restoring the lights was that of the section master, a fellow-servant of the engineer, which fact barred a recovery. And it is held that, as the reopening of the switch and its use was by direction of the division superintendent of the company, acting as its agent, it became its duty either to notify the engineer of such reopening or to restore the lights, if not to do both, and a failure so to do

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NEGLIGENCE—Continued.

would be its negligence, and not that of the section master. *Id.*

8. Previous negligence on the part of a railroad engineer, if established, is not important unless he is also shown to have been negligent at the time of the injury for which suit is brought. *Thompson v. Lake Shore & M. S. Ry. Co.*, 281.

9. In the absence of any evidence tending to show that a railroad engineer was negligent in allowing the fireman to operate the engine at the time the plaintiff was injured while attempting to couple cars, and which alleged negligence is the gist of plaintiff's action, a verdict should be directed for the defendant. *Id.*

10. A yard-master who has full charge of the yards of a railroad company, and hires and discharges the men employed therein, and assigns them to their labor, is the agent or vice-principal of the company in this respect, as well as in furnishing proper, suitable, and safe appliances and places for their labor; and notice to him of defects in the appliances so furnished is notice to the company, which is chargeable with his negligence, and responsible for his promise to remedy such defects, and to see that an incompetent fireman shall not handle an engine while switching is being done, upon which promise the switchman complaining of such defects and incompetency has a right to rely for a reasonable time, and to a reasonable extent. *Lyttle v. Chicago & West Michigan Ry. Co.*, 289.

11. The rule that a servant in entering a service accepts the ordinary hazards and dangers of his occupation, and that if, with knowledge of defects in the machinery and appliances furnished by the employer, or of the unusual dangers of the occupation, he continues in the employment, he will be regarded as assuming the dangers, and cannot recover for injuries arising therefrom, does not apply to a case where the employer (a railroad company) is notified by a switchman of the incompetency of a fireman who has been permitted to operate an engine in switching cars, and who refuses to work if the fireman is allowed to continue so to do, and who, in reliance upon the promise of the company that he shall not, continues his work, and is injured while the fireman is running the engine without his knowledge, the immediate

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NEGLIGENCE—Continued.

cause of such injury being the negligence of the fireman. *Id.*

12. A verdict is held to have been properly directed for the defendant in this case, as, under the undisputed circumstances, the plaintiff must be held to have accepted the risk of the caboose-car, in which he was sleeping while it was standing upon an extension track used during the night to shove cars in upon, being struck by such cars, and therefore to have no cause of action on account of injuries received in consequence of such collision. *Jacobs v. Lake Shore & M. S. Ry. Co.*, 299.

13. After the statute creating a liability on the part of cities for injuries sustained by reason of defective sidewalks took effect, it became the duty of such municipal corporations, if they continued to maintain sidewalks which were out of repair when such liability attached, to put them in good repair, and to keep them in a condition reasonably safe for public travel; and in a suit to recover damages for an alleged failure so to do, the length of time the sidewalk had been out of repair prior to the injury is a legitimate subject of inquiry, without reference to the date when the statute became operative. *Tice v. Bay City*, 461.

14. The plaintiff in a negligence case claimed to have been injured by getting her foot into a hole in the sidewalk at a point about midway between two gates leading into certain premises. The evidence as to defects was confined to that point, but the testimony developed that there was more than one hole, and some of the witnesses, not knowing in which hole the plaintiff's foot was caught, were interrogated on both sides as to the location of the holes they observed; but the jury were instructed that the plaintiff could not recover unless the city had knowledge, actual or constructive, of the *identical hole* into which the plaintiff stepped, and the *existence* of the other holes was not permitted to be used to show notice of this particular defect. And it is held that there was therefore no error in the admission of the testimony concerning the other holes. *Id.* 462.

15. In a negligence case against a city for injuries sustained by reason of a defect in a sidewalk, the court, at the request of the defendant's counsel, instructed the jury that if they found that the street commissioner went over the walk within two weeks previous to the accident, and looked out for defects in a careful manner, and did not see the defect

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NEGLIGENCE—Continued.

complained of, and had no actual knowledge of its existence, he used such care and diligence as was required of him, and that the defendant was not liable. The court added an instruction that, in determining the first three questions, the jury might consider *all* of the testimony in the case as to the existence of the defect previous to the time the commissioner went over the walk, and that, if they found that it was there when such examination was made, they could consider that fact in determining whether the commissioner used due care. And it is held that the added instruction was good law, and very properly given under the circumstances, there being testimony in the case that the defect had been there for months. *Id.*

16. A street railway company is not guilty of negligence in excavating and throwing up earth in the street while engaged in repairing and laying its track; and a declaration, in which the plaintiff claims to recover damages for injuries to his carriage by reason of its being driven onto such an obstruction and capsized, which fails to aver that the earth was allowed to remain in the streets for an unreasonable time, or in the night-time, or without lights or barriers as warnings, and which fails to aver that the driver was exercising due care, fails to set forth a cause of action. *Cowan v. Muskegon R'y Co.*, 583.

17. The refusal of the court in a negligence case to permit the defendants to run a "blower" used in the planing-mill in which the accident occurred, and which the jury were permitted to examine, in their presence, is not an abuse of discretion, it appearing that its construction had been altered since the plaintiff was injured by putting his arm into it when in operation. *Kinney v. Folkerts*, 616.

18. Testimony by which it is sought to corroborate witnesses as to the condition of machinery at the time of an injury, by showing in what condition the witness found it a week afterwards, is properly rejected. *Id.*

See EVIDENCE (16); MASTER AND SERVANT.

NEGLIGENT KILLING—See PLEADING (2–4).

NEW TRIAL—See CONDEMNATION PROCEEDINGS (2).

NOTICE—See ELECTIONS (2, 3); NEGLIGENCE (15).

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NUISANCE.

The bill in this case was filed to enjoin *perpetually* the use of certain premises near the outskirts of the city of Detroit for slaughter-house purposes. The neighborhood was a new one, as a residence part of the city, and a cattle-yard and slaughter-house had been in operation for some years in the near vicinity when defendant established his business. In granting relief in a modified form, the Court state the following propositions:

a—The defendant's business is not of such a character as, when properly conducted, to constitute a nuisance in the neighborhood where it is situated.

b—The noise made by hogs kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify a court of equity in destroying defendant's business for the sole purpose of ridding a neighborhood of such noise.

c—Complainants are not entitled to a decree which would interfere with defendant's business on the ground that its existence in the neighborhood depreciates the value of their property; they having a complete remedy at law for that injury.

d—The decree below is defective in failing to specify *what* defendant is required to do in order to comply with its requirements. To adjudge that he is so to conduct his business as not to be offensive is to give him no rule of conduct which the law had not before prescribed. The decree should have specifically pointed out the things that he is required to do, and to refrain from doing, in order to abate the nuisance which the court found to exist.

e—Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes *injurious to health* that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it; distinguishing this case from *People v. Lead Works*, 82 Mich. 471.

f—Most of the complainants having moved into this neighborhood since the defendant's business was established,

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NUISANCE—Continued.

although entitled to be protected from nuisances that endanger the health of themselves or families, yet a court of equity, in determining whether it will destroy defendant's business at their request, will consider whether the thing complained of is *noxious* or only *disagreeable*, and the further fact that complainants have voluntarily put themselves into the disagreeable neighborhood; this rule being recognized by How. Stat. § 1643.

g—Under the general prayer for relief, complainants are entitled to a decree requiring defendant to remove from his premises daily all manure, blood, offal, hair, and other refuse of his establishment in covered garbage wagons, such as are in use in the city of Detroit, or in other wagons that will effectually avoid the spread of offensive odors; to thoroughly cleanse and disinfect his premises daily; to provide sufficient pens for the hogs in store, so that they shall not be crowded and rendered noisy and quarrelsome by discomfort while in confinement; and to use such other precautions as are necessary to render his place of business clean and wholesome. *Ballentine v. Webb*, 38.

OCCUPANCY OF LAND—See EJECTMENT.

OFFICERS DE FACTO.

Act No. 455, Local Acts of 1889, consolidating the cities of East Saginaw and Saginaw into one municipality, to be known as the "City of Saginaw," provided that the aldermen of the two cities whose terms of office had not expired at the time of such consolidation should serve out their unexpired terms in their respective wards, which were unchanged territorily. And it is held that said aldermen, while acting as aldermen of the city of Saginaw, are at least *de facto* such officers as they represent themselves to be, and that their acts are valid. *Carlisle v. City of Saginaw*, 134.

OFFICIAL NOTICE OF ELECTION—See ELECTIONS (2).

OPTION—See SALE (4, 5).

PARENT AND CHILD—See CONTRACT.

PARKS AND BOULEVARDS—See MUNICIPAL CORPORATIONS (1).

PAROL TESTIMONY—See EVIDENCE (2).

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PARTIES.

1. Several persons who are encroaching upon a public street, but who are in no way connected with or dependent on each other in such action, need not be joined as defendants in a suit to remove an obstruction maintained by one of them. *Village of Grandville v. Jenison*, 54.
2. Respondents cannot be joined in *quo warranto* proceedings where the title of one to the office into which they are charged with intruding does not depend upon that of the other. *Attorney General v. Cain*, 223.
3. An amendment substituting the heirs of a member of a mutual benefit association,—who are entitled to the insurance agreed to be paid in his certificate by reason of the death of their mother, who was named as a beneficiary, prior to their father's death,—as plaintiffs in a suit brought in the name of her administrator to recover said insurance, is permissible. *Wood v. Circuit Judge*, 521.
4. A purchaser of mortgaged premises at an execution sale is a proper party defendant in a suit for the foreclosure of the mortgage. *Hayward v. Kinney*, 591.
5. There is no reason for making the holder of a tax title on mortgaged premises a defendant in a suit for the foreclosure of the mortgage, and where the complainant fails to show any other claim on his part the bill will be dismissed, with costs, as to such a defendant. *Id.*

PARTNERSHIP.

1. One partner gave the firm note payable to his order, and transferred it after maturity and a few days prior to the dissolution of the firm. The transferee paid to the other partner soon after the alleged purchase sums of money largely in excess of the amount due on the note, and two and a half years afterwards brought suit on the note, claiming to be a *bona fide* purchaser. On the trial the partner who made the note testified that it was given for money loaned the firm with the consent of his co-partner, who denied its execution, and defended on the theory that no such loan was made, but that the note was a fraud upon him, and that the plaintiff was not a *bona fide* holder as against such partner, but that he had conspired with the other partner to procure the execution of the note to protect himself against indorsements he had made for him. And it is held

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PARTNERSHIP—Continued.

that it was competent to inquire of the plaintiff on his cross-examination, as bearing upon the question of whether he in *fact* held the note at the time of making such payments, as he claimed to have done, and upon the further question of whether it was a *bona fide* note, and believed by him to be such, whether he had ever asked the partner making such defense for the money sued for. *Carpenter v. Greenop*, 49.

2. Where the term of a partnership is for an indefinite period, it may be dissolved at the will of either party. *Major v. Todd*, 85.
3. Where one partner holds exclusive possession of the partnership property, and wrongfully refuses to let in the other partner, he will be accountable in a court of equity to such partner for his share of the profits made, which accounting will cover the time during which the partnership assets are used in making them. *Id.*
4. In the absence of an express stipulation to that effect, a partner is not entitled to compensation for his services in and about the partnership business. *Id.*
5. Where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, to the knowledge of the person taking it, the other partners are not bound unless they have consented thereto; which assent need not be express, but may be shown by circumstances, like any other fact. *Towle v. Dunham*, 268.

See EVIDENCE (4).

PECUNIARY INJURY—See PLEADING (2–4).

PLEADING.

1. Plaintiff brought an action on the case to recover damages for the transfer of his note, given for Bohemian oats, to a *bona fide* purchaser without notice, whereby he was forced to pay the note. And it is held that the declaration, which is substantially set forth in the opinion, fails to state a cause of action. *Leland v. Goodfellow*, 357.
2. How. Stat. § 8314, which permits the personal representatives of a deceased person whose death was caused by the wrongful act, neglect, or default of another to bring an action for the damages thereby sustained, clearly contemplates that *pecuniary* injury must result from such act,

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PLEADING—Continued.

neglect, or default, which must be alleged in the declaration and shown by the evidence. *Hurst v. Detroit City Ry.*, 539.

3. In a suit by the administrator of the estate of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. § 8314, for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded, and established by the evidence. *Id.*

4. The right of action given by How. Stat. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1885 (3 How. Stat. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the first statute cited, by way of amendment to the declaration. *Id.*

5. A declaration in a negligence case for injuries to a carriage by its being driven onto an obstruction caused by earth thrown into the street by a street railway company while repairing its track, which fails to aver the existence of the obstruction for an unreasonable time, or in the night-time without lights or barriers as warnings, and the exercise of due care by the driver, fails to state a cause of action. *Cowan v. Muskegon R'y Co.*, 583.

See PARTIES (3); REPLEVIN (1); SALE (8).

POLICE COMMISSIONERS OF DETROIT—See PUBLIC OFFICERS.

POLICE FORCE OF DETROIT.

The board of police commissioners of Detroit cannot find a member of the force guilty of conduct immoral and unbecoming an officer without any specification of the charge. *Wellman v. Board of Metropolitan Police*, 558.

POLICEMAN—See QUO WARRANTO (1).

POSSESSION OF LAND—See EJECTMENT.

PRACTICE IN CIRCUIT COURT.

1. Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury; and whenever he expresses an opinion on any disputed fact, or of the character of a witness, or compliments one

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PRACTICE IN CIRCUIT COURT—Continued.

attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice them, he commits an error of law for which the verdict and judgment must be promptly set aside. *McDuff v. Detroit Evening Journal Co.*, 2.

2. It is never proper practice, when an objection to a question has been sustained, for counsel to state in the presence of the jury what he can or proposes to prove if allowed to do so. *Id.*
3. Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases. *Kinney v. Folkerts*, 617.
4. It is error for the circuit judge to enter the jury-room and give instructions to the jury without the presence of counsel or the court stenographer, which facts are properly brought before this Court by writ of *certiorari* in aid of and in connection with the writ of error. *Fox v. Peninsular White Lead & Color Works*, 676.

See BILL OF PARTICULARS.

PRACTICE IN LEGISLATIVE BODIES—See CONSTITUTIONAL LAW (7, 9).

PRACTICE IN SUPREME COURT.

1. Requests to charge appearing in the printed record, but not in the bill of exceptions, which does not show that any exceptions were taken to the refusal of the court to give them, nor that the attention of the court was called to such requests, cannot be considered. *Lindner v. Hine*, 512.
2. Under a writ of error bringing up the judgment record in a suit appealed from justice's court, in which judgment was rendered at the circuit against the surety in the appeal-bond under the statute, errors assigned upon the refusal of the circuit court to vacate the judgment as to the surety upon his petition and accompanying affidavits cannot be considered. *Buehler v. DeLemos*, 554.
3. Where in an insurance case the jury disregarded the instruction of the court limiting the loss recoverable under a certain clause of the policy to a sum less than that covered by the

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PRACTICE IN SUPREME COURT—Continued.

clause, and the jury rendered a verdict for the greater amount, and no application was made to the trial court to correct the error, the judgment will not be reversed, but will be corrected by making the necessary deduction. *Tubbs v. Dwelling-house Insurance Co.*, 647.

See ASSIGNMENT OF ERROR; COSTS (4).

PRESUMPTION—See ELECTIONS (2).

PRINCIPAL AND AGENT—See INSURANCE (1).

PROBATE COURT—See WILL (1).

PROOFS OF DEATH—See LIFE INSURANCE (2).

PROOFS OF LOSS—See FIRE INSURANCE (7, 8).

PROVOCATION—See EVIDENCE (9).

PUBLIC FUNDS—See DEPOSITORY OF PUBLIC FUNDS OF WAYNE COUNTY.

PUBLIC LANDS.

1. The Indian reserve at Sault Ste. Marie was not subject to pre-emption under the pre-emption law of 1841, even after the surrender by the Chippewa Indians to the United States, August 2, 1855, of the rights secured to them therein under the treaty of June 16, 1820; the government having seen fit to exempt Indian reservations from the provisions of said pre-emption act, even after the Indian title was extinguished. *Spalding v. Chandler*, 140.
2. The right secured to the Chippewa Indians under the treaty of June 16, 1820, in the Indian reserve at Sault Ste. Marie, was a *perpetual* one, and when said reserve was set apart and appropriated to their use for a place of encampment, the land could not be thereafter used or occupied by any one else while they accepted and used it, and all of the beneficial attributes and belongings of the fee were theirs, as far as any use of the same was concerned. *Id.*
3. The fact that a parcel of land embraced within the Indian reserve at Sault Ste. Marie was at one time within the so-called "Military Reservation," or at least surrounded by it, did not alter its character, or take away or destroy the right of the Indians to its use for the purpose for which it was set apart and reserved; nor could Congress by naming the land as a "military reservation" in the act of Congress of August 26, 1852, granting the right of way to the State of Michigan

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PUBLIC LANDS—Continued.

for the canal at Sault Ste. Marie, or by any other legislation, directly or indirectly, destroy the reservation after it had been set apart to and used by the Indians under the treaty or 1820; the voluntary cession of the land to the United States by the Indians themselves being necessary to deprive it of its character as an Indian reservation. *Id.*

PUBLIC OFFICERS.

The board of police commissioners of Detroit cannot find a member of the force guilty of conduct immoral and unbecoming an officer without any specification of the charge. *Wellman v. Board of Metropolitan Police*, 558.

PUBLIC POLICY.

A Michigan manufacturing firm sold their stock and material to an Illinois corporation engaged in a similar business in that state, and agreed not to engage in the business for five years in eight specified states, including those in which the parties resided, nor to allow the premises where they had been carrying on their business to be used for that purpose, nor to sell them for such use, without the consent of the corporation; which agreement is held void on the ground of public policy. *Western Wooden-ware Association v. Starkey*, 76.

See TAXES (9).

QUO WARRANTO.

1. The office of policeman, the incumbent of which is subject to the orders and direction of the common council of a city, and to removal at their discretion, does not rise to the dignity of being entitled to the notice of the Attorney General by *quo warranto* proceedings. *Attorney General v. Cain*, 223.
2. Respondents cannot be joined in *quo warranto* proceedings where the title of one to the office into which they are charged with intruding does not depend upon that of the other. *Id.*

RACE-HORSE—See REPLEVIN (2, 3).

RAILROAD COMPANIES.

1. A railroad company cannot legally give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds, to the exclusion of others engaged

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RAILROAD COMPANIES—Continued.
in the like business of the carriage of passengers and freight to and from its depot. *Kalamazoo Hack & Bus Co. v. Sootsma*, 194.
2. How. Stat. § 3355, requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, does not relate entirely to the mere carriage *in the cars* of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies, or corporations" at the point upon its road where the carriage ends. *Id.* 195.
3. A railroad company can make all needful reasonable rules and regulations concerning the use of its depot and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from its trains or depots, and it *probably* can prohibit all persons from soliciting business for themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so. *Id.*
See NEGLIGENCE (5–12, 16).

RATIFICATION—See ATTORNEY AND CLIENT (1).

RECORD OF BOARD OF SUPERVISORS—See TAXES (7, 8).

REPLEVIN.
1. Whether the property was unlawfully taken or is wrongfully detained, the declaration is in the same general form, and under it every question can be tried that is triable in the action of replevin. *Riley v. Littlefield*, 22.
2. In replevin for a race-horse seized by a sheriff on an attachment, the plaintiff may recover damages arising from his depreciation in value by reason of not being properly cared for. *Id.*
3. In such a case the plaintiff cannot recover as damages entrance fees and fines demanded by the trotting association under its rules as a condition to the entry of the horse in *future* races, the same having been paid after the horse was attached, he having been entered in certain races in which he failed to start by reason of such attachment. *Id.*
4. A father and mother included in a mortgage of their household goods a piano belonging to an infant daughter, and it

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REPLEVIN—Continued.

was replevied from them by the mortgagee. On the day the writ was delivered to the officer the daughter took out a writ of replevin for the piano from justice's court, after which the officer removed it from her parents' house, claiming to have levied his writ upon it on the day it was placed in his hands. Such proceedings were thereafter had as resulted in a judgment in favor of the father and mother, and also in favor of the daughter, but the piano remained in the possession of the mortgagee, to whom it had been delivered by the officer. After recovering said judgment the daughter sued the officer for the value of the piano, and for damages she had sustained by reason of its removal, in which suit the officer claimed that the judgment in the replevin suit was a bar to the second suit. And it is held that the removal of the piano after the commencement of the replevin suit was a new and independent taking, and that that suit had no connection with the second one that would make the judgment rendered therein a bar to the second suit. *Blaisdell v. Scally*, 149.

5. In such a case the daughter could only recover the value of the piano, with interest; but a judgment in her favor not exceeding the sum at which it was valued by the appraisers in the replevin suit against her parents, and for less than its value as testified to by her witnesses, is not reversed for the error of the court in instructing the jury as to the measure of damages. *Id.*

See EVIDENCE (7); TAXES (15).

REQUESTS TO CHARGE—See JURY (1); PRACTICE IN SUPREME COURT (1).

RESCISSION OF CONTRACT—See LIFE INSURANCE (4).

RES JUDICATA—See REPLEVIN (4).

RESTRAINT OF TRADE—See PUBLIC POLICY; RAILROAD COMPANIES.

RETURN—See ATTACHMENT SUIT (1).

SALE.

1. In this case it is held that if the defendants purchased from the plaintiff rubber belting for sale in their business with an express or implied warranty of quality, which, owing to the situation of the belting, could not be determined by inspection before trial, and paid for it before ascertaining that it

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SALE—Continued.

was worthless, which it proved to be on such trial, they would have a right to recover back the purchase price, or set it off in an action of *assumpsit* brought by the plaintiff to recover a money demand due from the defendants; and that the burden of proof would be upon the defendants to show the breach of warranty, and that the belting was absolutely worthless for any purpose, if not returned or tendered to the plaintiff. *Gutta Percha & Rubber Manfg. Co. v. Wood*, 452.

2. The charge in this case (see opinion), except in so far as it instructs the jury that if the belting was of some value they should find that value, and deduct it from the amount of the defendants' claim, is sustained by *Petersen v. Lumber Co.*, 51 Mich. 86; and, as the jury found the full amount of defendants' claim, the error in such exception was without prejudice. *Id.*

3. A contract by which the title to goods is to remain in the owner until after they are paid for, or sold in the due course of trade, by the person to whom they are delivered, is valid, and such purchasers take a good title, and those who do not purchase in the due course of trade cannot rely upon the bare possession of their vendor as conclusive evidence of title. *Pratt v. Burhans*, 487.

4. There is a wide difference between an option given to the buyer to return the goods if not satisfactory and a warranty of quality. The latter is continuing, and runs with the goods; but the former must be exercised within a reasonable time after the receipt of the goods, and their retention after the expiration of such reasonable time must be regarded as an acceptance, unless the option is extended in clear and unmistakable language. *Childs v. O'Donnell*, 533.

5. An option given to a purchaser to return goods if not satisfactory on trial does not extend to subsequent orders and invoices of goods, unless repeated with each order, or unless general language was used covering *all* orders or sales. *Id.*

6. At the time of the delivery of goods shipped to a merchant on his written order his store and stock were in the possession of an agent who represented several mortgagees, whose mortgages were given after the goods were ordered, and under one of which a sale was made at about the date of such delivery, and the goods bid in by one of the mort-

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SALE—Continued.

gagees, who remained in possession, and from whom, and the merchant, who was acting as agent for the mortgagee, a portion of the goods ordered were replevied by the vendor, who claimed the right to stop them in transit. And it is held that if the merchant was insolvent when he made the order, or became so at any time before the claimed delivery of the goods, and if they were never actually delivered to his possession, the vendor's rights were paramount to any acquired at the mortgage sale, which question of actual delivery was for the jury. *Kingman & Co. v. Denison*, 608.

7. In a suit to recover for a bill of goods sold to the defendant, he resisted payment for a portion of the goods on the ground that they were purchased under a specific warranty, which they failed to fill, and claimed damages by way of recoupment. Plaintiff conceded that the remainder of the goods had been paid for, or a tender made of the balance due therefor, and that if the goods were sold under a warranty, as claimed by the defendant, he was entitled to a judgment of no cause of action. The case was tried upon this issue, the court holding that the defendant's tender precluded him from recovering any judgment under his notice of recoupment; and defendant recovered a judgment of no cause of action. And it is held that the suit was not a bar to an action by the plaintiff to recover the value of the goods covered by the warranty on the refusal of the defendant to surrender possession of the same. *Aldine Manfg. Co. v. Barnard*, 632.

8. On the refusal of a purchaser, who has rescinded a contract for the sale of personal property, to deliver the property to the vendor, he may waive the tort and sue in *assumpsit* for its value; which action can be maintained on the common counts, even though the declaration does not set forth such waiver. *Id.*

SELF-DEFENSE.

A defendant in a civil suit for assault and battery who claims to have acted in self-defense must satisfy the jury that he acted honestly in using force to repel the attack of the plaintiff, and in determining that question they are to consider the reasonableness of the means made use of. *Kent v. Cole*, 579.

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SERVICE—See ATTACHMENT SUIT (1).

SETTLEMENT.

This case involves the question of the effect of the acceptance by the plaintiff of a check for the amount claimed by the defendant to be due him for ties furnished the defendant as per a statement accompanying the check, and which plaintiff receipted, but on the same day sent defendant a protest against the inspection upon which the account was based. And it is held that the whole question as to whether it was a conclusive and binding settlement was properly left to the jury, and the judgment in favor of the defendant is affirmed. *Robinson v. Detroit, Lansing & Northern R. R. Co.*, 658.

See TAXES (5).

SIDEWALKS—See NEGLIGENCE (13).

SIGNATURE—See TAXES (6, 7).

SLANDER—See LIBEL AND SLANDER.

SLAUGHTER-HOUSE—See NUISANCE.

SPECIAL ELECTION—See ELECTIONS.

SPECIFICATIONS—See PUBLIC OFFICERS.

STATUTE OF FRAUDS.

In this case it is held that if defendant impliedly promised to pay plaintiffs for materials furnished to third parties, who had contracted to build defendant a house, by asking plaintiffs to wait for their pay until a certain date, there is nothing on the record to take such promise out of the statute of frauds, by estoppel or otherwise. *Preston v. Zekind*, 641.

STATUTES CONSTRUED.

1. The adoption by the public of a road laid out in *fact*, but not legally under the statute, and its use to the full extent that the public had occasion to use it for the statutory period, will constitute it a highway by user under Comp. Laws 1871, § 1268. *Village of Grandville v. Jenison*, 54.
2. The statute does not fix the number who must travel upon a highway in order to determine whether it exists by user. It must be *used* by the public, and the public are all who have occasion to use it. *Id.*
3. A county clerk presented a claim to the board of supervisors for fees for issuing subpoenas to delinquent tax-payers under

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STATUTES CONSTRUED—Continued.

the tax law of 1889 (Act No. 195), and for moneys paid the register of deeds for searches in his office to ascertain the names of such owners, which claim was rejected; and in denying a *mandamus* to compel its allowance it is held:

a—There is no provision of law entitling the clerk to such *fees*, nor is he required to make such searches.

b—The claim of relator is not one which the board of supervisors can be compelled to audit and allow, although, upon a proper showing, the board may be required to act under section 100 of said tax law, and determine what amount of compensation, if any, the relator shall receive for his services under the law, and how it shall be paid. *Sherman v. Supervisors of Sanilac Co.*, 108.

4. The State is not liable for costs in case of a decision in *favor* of a contesting tax-payer in proceedings under the tax law of 1889 for the sale of lands delinquent for taxes. *Auditor General v. Baker*, 118.

5. But one subpoena should be issued to a delinquent tax-payer who appears on the tax petition as the owner of several descriptions of land, and where a subpoena is issued and served for each description a tender of the sheriff's fee for one service is sufficient. *Id.*

6. A petition for the sale of delinquent tax lands, conforming in its statement of facts to the form prescribed by section 52 of the tax law of 1889, is sufficient. *Auditor General v. Sloman*, 118.

7. Act No. 455, Local Acts of 1889, consolidating the cities of East Saginaw and Saginaw into one municipality, to be known as the "City of Saginaw," provided that the aldermen of the two cities whose terms of office had not expired at the time of such consolidation should serve out their unexpired term in their respective wards, which were unchanged territorily. And it is held that said aldermen, while acting as aldermen of the city of Saginaw, are at least *de facto* such officers as they represent themselves to be, and that their acts are valid. *Carlisle v. City of Saginaw*, 134.

8. The issuance of bonds by the common council of the city of Detroit to raise money to pay for lands purchased or condemned by the commissioners of parks and boulevards under section 15 of Act No. 388, Local Acts of 1889, need not be approved of by the board of estimates of the city, established

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STATUTES CONSTRUED—Continued.

by Act No. 488, Local Acts of 1887. *Commissioners of Parks and Boulevards v. Rush*, 154.

9. In the absence of a contract between a log-running company and a log-owner, fixing the terms and price of running his logs, the company is left, under the statute, to run such of the logs as obstruct the stream, and charge therefor a reasonable compensation. *Seaton v. Pere Marquette Boom Co.*, 178.

10. How. Stat. § 5964, gives the probate court jurisdiction in the settlement of estates to construe wills. *Byrne v. Hume*, 185.

11. How. Stat. § 3355, requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, does not relate entirely to the mere carriage *in the cars* of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies, or corporations" at the point upon its road where the carriage ends. *Kalamazoo Hack & Bus Co. v. Sootsma*, 195.

12. The condition attached by respondent to the use by the relator of wooden poles outside of the fire limits of the city, that it should furnish passengers with transfers on certain designated lines of its road without additional charge, is held inoperative and void, being in conflict with section 14, chap. 95, How. Stat.; but as the relief prayed for by relator has been voluntarily granted by respondent, *mandamus* is denied. *Electric Railway Co. v. Common Council*, 257.

13. How. Stat. § 7545, which excludes the testimony of a party to a suit which is prosecuted or defended by a corporation, in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within that of any surviving officer or agent, is held not to apply to the testimony of a plaintiff in a negligence case against a railroad company to an interview with the yard-master, since deceased, in the presence of the master of the round-house, who survives him. *Lyttle v. Chicago & West Michigan R'y Co.*, 289.

14. Section 15, tit. 6, of the charter of the city of Grand Rapids, which provides that the plans and specifications of the work, for the payment of which an assessment is ordered to be made, may be *changed*, and the work added to or diminished,

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STATUTES CONSTRUED—Continued.

at any time before the completion of the assessment roll therefor, does not refer to the contract for the work which, under the charter, must be awarded to the lowest bidder; and the changes covered by section 15, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. *Ely v. City of Grand Rapids*, 336.

15. How. Stat. § 501, requiring that every order, resolution, and determination of a board of supervisors shall be recorded in the records of such board, and signed by the chairman and clerk of the board, includes all the proceedings required by law to be entered upon the records of the board. *Weston v. Monroe*, 341.

16. A supervisor's certificate of assessment under How. Stat. § 1025, in which the words "*fixed* or auction sale" are used instead of "*forced* or auction sale," is fatally defective. *Paldi v. Paldi*, 346.

17. How. Stat. § 6193, providing for the filing of chattel mortgages, applies only to mortgages of goods and chattels which are capable of delivery, and not to an assignment of open accounts. *Preston National Bank v. Smith Middlings Purifier Co.*, 364.

18. Act No. 393, Local Acts of 1879, authorizing the county treasurer and board of auditors of Wayne county to designate a depository for the public funds, is construed as follows:

a—In making such designation the treasurer and board have an equal voice.

b—Such designation is good and valid until the expiration of the term of office of the county treasurer, and until a new designation is made by his successor and the board of auditors, which it is their duty to make as soon as convenient after the treasurer qualifies and enters upon the discharge of the duties of his office, and without unnecessary delay.

c—Until such new designation is made, it is the duty of the treasurer to deposit the public funds in the existing depository or depositories. *City Savings Bank v. Huebner*, 391.

19. The death of a person elected to the office of auditor of Wayne county before he has qualified, and before the expi-

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STATUTES CONSTRUED—Continued.

ration of the term of office of the incumbent, creates no vacancy that the Governor can fill by appointment, but the full term must be filled by a special election under How. Stat. §§ 138 (subd. 3), 141; the case being ruled by *People v. Lord*, 9 Mich. 227. *Lawrence v. Hanley*, 399.

20. It was the evident intention of the Legislature in enacting Act No. 192, Laws of 1879 (How. Stat. § 9315), to exclude from its operation non-enumerated cases of libel and slander known to the common law, namely, where one is held up to contempt and ridicule, and possibly where one may be charged with having a loathsome disease. *Glassmire v. Circuit Judge*, 447.

21. There is no statutory authority for awarding either witness or attorney fees in condemnation proceedings under Act No. 388, Local Acts of 1889, relating to parks and boulevards in the city of Detroit. *Hester v. Commissioners of Parks and Boulevards*, 450.

22. After the statute creating a liability on the part of cities for injuries sustained by reason of defective sidewalks took effect, it became the duty of such municipal corporations, if they continued to maintain sidewalks which were out of repair when such liability attached, to put them in good repair, and to keep them in a condition reasonably safe for public travel. *Tice v. Bay City*, 461.

23. A designation by the common council of the amount of tax to be raised in a village under How. Stat. §§ 2923–2925, by a fixed percentage, is sufficient. *Boyce v. Peterson*, 490.

24. How. Stat. § 8314, which permits the personal representatives of a deceased person whose death was caused by the wrongful act, neglect, or default of another to bring an action for the damages thereby sustained, clearly contemplates that *pecuniary* injury must result from such act, neglect, or default, which must be alleged in the declaration and shown by the evidence. *Hurst v. Detroit City Ry.*, 539.

25. In a suit by the administrator of the estate of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. § 8314, for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which

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STATUTES CONSTRUED—Continued.
damages are special in their character, and must be specially pleaded, and established by the evidence. *Id.*

26. The right of action given by How. Stat. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1885 (3 How. Stat. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the first statute cited, by way of amendment to the declaration. *Id.*

27. A return by an officer to a writ of attachment, issued against two joint debtors, that he had attached the goods of one of them, upon whom he had made personal service, and that after diligent attempts he was unable to find the other defendant in his county, and had left a certified copy of the attachment and inventory with the defendant in whose possession he found the attached goods, the other defendant having no last place of residence in the county, is in accordance with How. Stat. § 6841, and authorizes the justice to proceed under How. Stat. § 6845. *Buehler v. DeLemos*, 554.

28. Under a will devising real estate in equal shares to the brothers and sisters of the testator and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator who survive him will take the estate devised to their parents respectively, such a devise being governed by How. Stat. § 5812. *Strong v. Smith*, 567.

29 How. Stat. § 4238, which protects the money payable on a life insurance policy taken out by a husband or father for the benefit of his wife or children from the claims of his creditors, does not cover the assignment to them of a policy payable to himself, his executors, administrators, or assigns. *Ionia County Savings Bank v. McLean*, 626.

30. By section 8 of the board of public works act of the city of Grand Rapids (Act No. 321, Laws of 1873) it is made the duty of the board, when the common council decide that the construction of a sewer is a necessary public improvement, to determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work and of the material to be used in detail, and cause to be prepared the necessary plans and

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STATUTES CONSTRUED—Continued.

specifications, and report their estimate to the common council as a basis for assessing or otherwise raising the funds necessary to enable the board to go forward and complete such work. Prior to the presentation to the board of the resolution of the common council as to the construction of a certain sewer, the city surveyor had made the necessary surveys, examinations, and estimates, and had prepared a full and complete plan and profile of the proposed sewer, showing in detail the manner of its construction, and its size and shape and the kind and quantity of materials to be used, the cost of which construction and materials was not carried out in detail, but was susceptible of computation by any member of the board or common council from the *data* thus furnished. On receiving the resolution for the construction of the sewer, the board of public works directed the city surveyor to prepare the necessary plans and specifications, and he at once presented the ones he had prepared, which were examined and approved by the board at the same meeting; which action is held a substantial compliance with the provisions of the section cited. *Baisch v. City of Grand Rapids*, 666.

STOPPAGE IN TRANSIT—See SALE (6).

STREET RAILWAY—See MUNICIPAL CORPORATIONS (2); NEGLIGENCE (16).

SUBSTITUTION OF PLAINTIFFS—See PARTIES (3).

SUPERVISOR—See TAXES (10).

SUPPLEMENTAL BILL—See EQUITY PLEADING.

TAXES.

1. A county clerk presented a claim to the board of supervisors for fees for issuing subpœnas to delinquent tax-payers under the tax law of 1889 (Act No. 195), and for moneys paid the register of deeds for searches in his office to ascertain the names of such owners, which claim was rejected; and in denying a *mandamus* to compel its allowance it is held:

a—There is no provision of law entitling the clerk to such *fees*, nor is he required to make such searches.

b—The claim of relator is not one which the board of supervisors can be compelled to audit and allow, although, upon a proper showing, the board may be required to act

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TAXES—Continued.

under section 100 of said tax law, and determine what amount of compensation, if any, the relator shall receive for his services under the law, and how it shall be paid. *Sherman v. Supervisors of Sanilac Co.*, 108.

2. On filing a tax petition under the tax law of 1889 (Act No. 195), upon which 45 descriptions of land belonging to the same person appeared as delinquent, the clerk issued 45 subpœnas directed to such owner, and requiring him to appear and answer the petition, and inserted in *each* of 44 of the subpœnas *one* of said descriptions, all of which subpœnas were served by the sheriff. The owner tendered to the county treasurer the amount due for taxes, interest, and charges, and the legal fee for issuing and serving *one* subpœna, which tender was refused, but was held sufficient by the court below, which decision is affirmed on appeal. *Auditor General v. Baker*, 118.

3. A petition for the sale of delinquent tax lands, conforming in its statement of facts to the form prescribed by section 52 of the tax law of 1889, is sufficient. *Auditor General v. Sloman*, 118.

4. Losses arising from the sale of the "five-year list" of State tax lands, so called, under the tax law of 1869, are improper charges against the counties, and their collection cannot be enforced. *Auditor General v. Supervisors of Midland Co.*, 121.

5. In this case it is held that the claimed settlements of the State with the county do not show such an accounting as should estop the county from asking that charges for losses arising from the sale of the "five-year list" of State tax lands, so called, under the tax law of 1869, should be stricken from the account as stated by the State and sought to be enforced by *mandamus*. *Id.*

6. The fact whether or not the requisite number of persons have signed a petition for the improvement of a street, when the power to make it depends upon the signatures to the petition of a given number or proportion of the property-holders to be affected, can be inquired into, and the want of such number of signatures shown as a defense, in an action to collect the assessment, if the statute governing the proceeding does not provide that the determination of the proper

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TAXES—Continued.

municipal board shall be *conclusive* on the subject. *Auditor General v. Fisher*, 128.

7. The failure of the chairman of the board of supervisors to sign the record of the proceedings of the board in equalizing the assessments and apportioning the State tax is fatal to the validity of a tax deed based thereon. *Weston v. Monroe*, 341.

8. How. Stat. § 501, requiring that every order, resolution, and determination of a board of supervisors shall be recorded in the records of such board, and signed by the chairman and clerk of the board, includes all the proceedings required by law to be entered upon the records of the board. *Id.*

9. Public policy will not permit any tampering with an assessment roll after it is equalized and completed and certified as required by law. *Id.*

10. A supervisor authorized a neighbor to copy the roll of the previous year so far as the real estate was concerned, making only such changes as were necessary by change of owners, and to attach and sign the statutory certificate; which action is held not to be in accordance with the law, which requires the exercise of the best judgment of the supervisor in assessing property at its cash value. *Paldi v. Paldi*, 346.

11. A supervisor's certificate of assessment under How. Stat. § 1025, in which the words "*fixed* or auction sale" are used instead of "*forced* or auction sale," is fatally defective. *Id.*

12. The record of equalization set forth in the opinion is held to be too uncertain to have any value as a public record. *Id.*

13. A designation by the common council of the amount of tax to be raised in a village under How. Stat. §§ 2923–2925, by a fixed percentage, is sufficient. *Boyce v. Peterson*, 490.

14. There is no provision of the statute requiring the evidence of the posting of notices of the meeting of the board of review in a village to be recorded. *Id.*

15. Replevin will not lie for property seized by the proper officer, under a tax roll and warrant fair upon their face, to satisfy a tax. *Id.*

See CONSTITUTIONAL LAW (1, 12, 13); COSTS (1); MORTGAGE (4, 5); MUNICIPAL CORPORATIONS (3, 5).

TAX LAW OF 1889—See CONSTITUTIONAL LAW (1); TAXES (1–3).

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TERM OF OFFICE—See CONSTITUTIONAL LAW (4).

TENDER—See EQUITY PLEADING; MORTGAGE (2).

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TITLE TO OFFICE—See MANDAMUS (3).

USER—See HIGHWAYS (3, 6, 9, 10).

VACANCY—See CONSTITUTIONAL LAW (5); ELECTIONS (1, 2).

VERBAL STATEMENTS OF AGENT—See INSURANCE (1).

WAIVER—See FIRE INSURANCE (1).

WARRANTY—See INSURANCE (2, 3); SALE (1, 2, 4, 7).

WAYNE COUNTY—See DEPOSITORY OF PUBLIC FUNDS OF WAYNE COUNTY.

WILL.

1. How. Stat. § 5964, gives the probate court jurisdiction in the settlement of estates to construe wills. *Byrne v. Hume*, 185.

2. A son devised to his aged parents, as *joint tenants*, a farm which he had taken subject to a mortgage, and upon which they resided. He also directed his executor to pay them, or the survivor, a legacy of $3,500 out of his life insurance as soon as it was collected. The executor wrote to the parents that he had collected the insurance, and that, as they were probably aware, their son intended to have the mortgage upon the farm paid off, and inclosed an order for them to sign directing him to make such payment out of the legacy, which they did, and returned the order to him, and he paid the mortgage, and forwarded it to them, and paid them the balance of the legacy. Accounts were filed, from time to time, by the executor, in one of which appeared a credit for the amount of the legacy, to which objection was filed, but the account was allowed, and no appeal was taken; but no final settlement of the estate was had, as under the will the executor was to carry on the business of the testator, and such final settlement was to be deferred for six years. On the hearing of a petition by the surviving parent for an order directing the executor to pay her the balance of the legacy, the probate court construed the will in harmony with the action of the executor, and dismissed the petition, which order was not appealed from, but the petitioner filed a bill

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WILL—Continued.

in chancery against the executor to recover the legacy, less the amount paid to her and her husband, which bill is dismissed on the ground that the question of the construction of the will is *res judicata;* and the following propositions are summarized from the opinion:

a—The executor held the funds for distribution to the parties to whom the testator intended by the will to give them, and, if he was at all uncertain whether the testator meant to have the mortgage paid out of the legacy, it was his plain duty to have filed a bill to secure a construction of the will.

b—The settlement of the accounts of the executor, from time to time, in the probate court, though known and assented to by complainant, and the order given for the payment of the mortgage out of the legacy, could not estop complainant from setting up her claim to it.

c—The fact that the executor has paid the mortgage out of the legacy, under the circumstances stated, ought not to change the situation of the parties or their rights, though it may have been paid with the consent of the legatees.

d—It was the plain intent of the testator that his executor should pay the mortgage the same as other debts, and preserve the farm for his aged parents, and to pay to them the legacy as soon as the life insurance was collected, and in making such payment he discharged a legal duty. *Id.*

3. A testator gave the executors named in his will full power and authority to sell and convey all of his estate, and directed them to invest the proceeds in certain specified securities. He then bequeathed to his wife, during her natural life, the use, income, and profit of all of his estate, and the interest arising from such investments, out of which she was to support his minor children until 16 years of age, or until able to support themselves; and after her death the remainder and residue of his estate was devised to his children equally, to have and to hold forever. The executors resigned without executing the trust, and an administrator *de bonis non* was appointed, and the estate was closed as far as payment of debts and expenses of administration were concerned, leaving about $4,000 in personal property in the administrator's hands; and on his refusal to turn it over to

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WILL—Continued.

the widow she filed a bill to construe the will, and it is held:

a—That the interest of the complainant is limited to the use of the estate during her life, and after her death it vests in the children.

b—Whether or not the testator intended to vest any estate in the executors, or only to give them power of disposition, does not become material. The execution of the trust failed by their resignation before any portion of the estate was disposed of, or any distribution made of the estate, which is in the hands of the administrator, and upon proper application a court of chancery would have power to appoint the necessary trustee for its control and management, and provide for the payment of the income over to the widow. *Schehr v. Look*, 263.

4. A wife by her will bequeathed $15,000 to her son, to be paid to him on arriving at full age, and devised certain real estate to her husband. The will provided that if, after the payment of her debts and the charges of administration, the estate proved insufficient to pay the legacies in full, they be paid in a specified order, the son's legacy being given priority over the devise to the father. The husband was appointed executor, and sold a portion of the land devised to him at private sale, conveying the same in his individual character and as executor, and such proceedings were thereafter had in probate court as resulted in his being directed to pay over to his son's guardian the amount due from him to the estate, which payment he failed to make, and absconded. An administrator was appointed, who, after a judgment had been rendered upon the executor's bond for the amount due the legatee, and after return of an execution unsatisfied, filed a petition in the probate court for the sale of the land devised to the husband to pay the balance due on the son's legacy; and in affirming an order for such sale it is held:

a—That the land devised to the husband is subject to the son's legacy.

b—That the purchaser from the husband is chargeable with notice of what an examination of the probate records would have disclosed, namely, that there had been no settlement of the estate, and that the son's legacy had not been

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WILL—Continued.

paid; and that he could get no better title under his deeds than the husband had at the time of their execution.

c—That, under the facts appearing in the case, the probate court had jurisdiction to make the order, and a resort to equity was unnecessary to subject the land to the payment of the legacy.

d—That the right of the legatee to follow the land for the payment of his legacy was not barred by the statute of limitations, the estate never having been closed, and it being apparent from the terms of the will that it was not intended that it should be closed in the six years within which, as claimed, an executor can be authorized to sell lands to pay legacies; the case being ruled by *Church v. Holcomb*, 45 Mich. 29. *In re Moores' Appeal*, 474.

5. Under a will devising real estate in equal shares to the brothers and sisters of the testator and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator who survive him will take the estate devised to their parents respectively, such a devise being governed by How. Stat. § 5812. *Strong v. Smith*, 567.

6. This case involves the construction of a will, certain clauses of which are held to be void for attempting to suspend the power of alienation contrary to the provisions of How. Stat. §§ 5530, 5531. *Farrand v. Petit*, 671.

WITNESS FEES—See COSTS (3).

WRIT OF ASSISTANCE—See MORTGAGE (5).

YARD-MASTER—See NEGLIGENCE (10).

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[1] See Statutes Construed.
[2] See Constitutional Law.

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[1] Cumulative voting act declared unconstitutional.

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